No. 8835

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, a corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

MESSRS. DAVIS AND GROFF,
1333 Dexter Horton Building,
Seattle, Washington,
Attorneys for Appellant.

MR. RAY R. GREENWOOD,
Bremerton, Washington,
Attorney for Appellees.

MR. H. SYLVESTER GARVIN,
955 Dexter Horton Building,
Seattle, Washington,
Attorney for Appellees. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington for Kitsap County.

No. 12724.
No. 21098 (Dist. Court).

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Plaintiffs,

vs.

FIDELITY AND GUARANTY FIRE CORPORATION OF BALTIMORE, MARYLAND, a corporation engaged in the business of writing fire insurance in the State of Washington, and F. E. LANGER,

Defendants.

COMPLAINT.

Come now the plaintiffs and for a cause of action allege:

I.

That the plaintiffs, William E. Bilquist, John Myrhe and Signe Myhre, as a community were at all times hereinafter mentioned joint owners of certain real estate situated in the County of Kitsap, State of Washington, being described particularly as

> Lots 1 and 2, Block 4, also lots 8 and 9, Block 5, Davis Addition to Manchester, Washington.

That heretofore and on the 10th day of August, 1935, there was situated upon said property a cer-

tain building known as the Manchester Inn, used as a place of residence for these plaintiffs as well as an inn and tavern.

II.

That the Fidelity and Guaranty Fire Corporation of Baltimore is a corporation, organized and existing under the laws of the State of Maryland, with a license to transact business in the State of Washington and to write policies of fire insurance under and pursuant to the laws of said state. That the defendant F. E. Langer is President and Manager of the Kitsap County Bank, a banking corporation at Port Orchard, Kitsap County, Washington, and in connection with said business and in addition thereto is and at all times hereinafter mentioned the general agent at Port Orchard of the said Fidelity and Guaranty Fire Corporation of Baltimore.

III.

That heretofore, to-wit: on the 10th day of August, 1935, the said Kitsap County Bank having taken a mortgage upon the property of the plaintiffs, above named, and the said F. E. Langer, assuming for the protection of his own Bank and for the protection of these parties to place upon said property certain fire protection and insurance; upon his own motion and at his own instance with the [2] consent and approval of these plaintiffs caused to be written and delivered to his own Bank, as incumbrancer, a certain policy of fire insurance,

being Policy No. 28222, wherein and whereby the said Fidelity and Guaranty Fire Corporation of Baltimore did insure said real estate in the sum of twenty-five hundred dollars ($2500.00); and the furniture, personal property, and equipment situated therein, also the property of these plaintiffs, in the full sum of fifteen hundred dollars ($1500.00). That said policy was written with insurance running to William E. Bilquist, plaintiff herein assured, with insurance payable to the Kitsap County Bank as its interest may appear; and this fact having been made known to the defendant John Myhre and objection made by him to the insurance not being made to Bilquist and himself, jointly, the said F. E. Langer thereupon placed upon said policy a certain clause providing that said insurance should be made payable to John Myhre and Signe Myhre, as incumbrancers, as their interest appeared, and advised the said John Myhre and Signe Myhre, that he had corrected the policy in such manner as to protect them fully to the amount of their interest, and thereafter drew upon their account in the Kitsap County Bank at Port Orchard, Washington, for the full premium of said policy, to-wit the sum of seventy-seven dollars ($77.00).

IV.

That thereafter and on the 12th day of September, 1936, a fire occurred upon the said premises, totally destroying the building hereinabove referred to, as well as all personal property situated therein;

which personal property was of the fair market value of one thousand eight hundred seventy-one dollars ($1871.00) an itemized list of which is hereto attached and marked "Exhibit A" and by such reference made a part hereof; and upon the occurrence of said fire, the said F. E. Langer immediately assumed the duty of procuring an adjuster, notifying the company, and protecting the interest of those assured relative to said fire. That thereafter on the 3rd day of December, 1936, a duly sworn proof of loss was made by these plaintiffs themselves and forwarded to the defendant insurance company, claiming a total loss upon said property and furniture of four thousand dollars ($4000.00), the amount of said policy. That these plaintiffs did not know or discover the necessity of a proof of loss until after the expiration of sixty (60) days from the date of fire, the policy being at all times in possession of the said F. E. Langer, agent of the defendant corporation, and he having dealt directly with one Allen V. Kelly, a licensed adjuster of the State of Washington relative to said loss; and that the said insurance company, their agent, and said adjuster led these plaintiffs to believe that the entire matter was being handled and lulled them into security in their failure to employ counsel, seek advice, or protect their own rights.

V.

That thereafter on the 17th day of December, 1936, the defendant insurance company, above

named, rejected liability upon said policy in any amount whatsoever and tendered to these plaintiffs the sum of seventy-seven dollars ($77.00), the premium alleged to have been paid thereon. [3]

VI.

That although no specific grounds of rejection were set forth in the notice of Allen V. Kelly, aforesaid, a copy of which is hereto attached and marked "Exhibit B", these plaintiffs alleged that said policy is claimed to be defective, particularly in that the premises were operated as a tavern and inn rather than as an unprotected dwelling for which it was insured, and that therefore the rate paid, or to-wit the sum of seventy-seven dollars ($77.00) premium was inadequate; also that John Myhre and Signe Myhre are shown upon said policy to be incumbrancers, where in truth and in fact they were one-half owners, but relative to said matters these plaintiffs allege that all these facts and the true situation relative to said property, the use thereof, and the relation thereof were known to the defendant Langer, who is acting for and representing the defendant insurance company as general agent. That no statements or representations of any kind, nature, or description were made by these plaintiffs, or any of them, relative thereto. That said policy was never delivered to these plaintiffs, but was retained by said F. E. Langer for the Kitsap County Bank as incumbrancer, and that said policy was never placed in the possession of

these plaintiffs at all, but that each and every act pertaining to the insuring of said property was assumed to be done and was done by the said F. E. Langer on his own initiative and based upon his own knowledge relative to the property, its use, and ownership.

Wherefore, these plaintiffs pray: judgment as follows: against the defendants and all of them in the full sum of four thousand dollars ($4000.00) together with their costs and disbursements herein to be taxed.

RAY R. GREENWOOD
Attorney for Plaintiffs.

State of Washington,
County of Kitsap—ss.

John Myhre, being first duly sworn, on oath, deposes and says: that he, as an individual, is one of the plaintiffs named in the above entitled action; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

JOHN MYHRE

Subscribed and Sworn to before me this 29th day of December, 1936.

RAY R. GREENWOOD
Notary Public in and for the State of Wash., residing at Bremerton.

[Endorsed]: Filed Jan. 6, 1937. [4]

EXHIBIT "A"

Upstairs—Bedrooms

11 rugs—each room	$ 85.00	
10 beds—springs and mattresses	210.00	
11 dressers at $15	165.00	
10 wash stands	30.00	
10 wash bowls and pitchers at $1.00	10.00	
20 chairs at $1.50	30.00	
20 quilts	20.00	
40 sheets & pillow slips	60.00	
20 pillows at $2.00	40.00	
Hall carpet on stairs	5.00	
Blinds and curtains	15.00	
		655.00

Bathroom—Upstairs

1 dresser	5.00	
1 bowl and pitcher	1.00	6.00

Lobby

1 settee—chair and rocker	35.00	
1 rocker	7.00	
1 straight chair	4.00	
1 library table (hardwood)	10.00	
1 radio	15.00	
(1 rug included in upstairs)		
2 sets curtain and blinds	8.00	
		79.00

Dining Room		
6 sets dining tables with 4 chairs @ $9	54.00	
2 sets tables—6 chairs @ $11	22.00	
1 piano	150.00	
1 circulating wood heater	35.00	
10 sets curtains and blinds @ $3	30.00	
8 table cloths @ $1.50	12.00	295.00
Bar		
1 counter and 1 back bar	35.00	
Taps, taprods, hose, air drums, coil box	45.00	
1 small Norge	50.00	
Misc. glasses and curtains	25.00	
6 stools @ $1	6.00	
		161.00
Ladies' Rest Room		
1 dresser	20.00	20.00
Kitchen		
2 plate range	25.00	
1 oven electric range	60.00	
1 dish-up table	10.00	
1 dish rack	15.00	
1 Frigidaire (large)	250.00	
2 side boards (hardwood)	70.00	
dishes & silverware (service for 40 people)	100.00	
Miscellaneous utensils	25.00	
Electric Water Pump	100.00	655.00
Final Total		$1904.00

[5]

EXHIBIT B

ALLAN V. KELLY
Fire Insurance Adjuster
Empire Building
Seattle, Washington

December 17, 1936.

Mr. Ray R. Greenwood,
Attorney at law,
Bremerton, Washington.

Re: Claim—Policy No. 28222:

Dear Sir:

A paper signed by John Myhre purporting to be a Proof of Loss has been received by us and we hereby give you notice that same is rejected and liability denied.

We hereby tender $77.00, the premium paid for said policy, and $6.25 which is 6% interest from August 10th, 1935 to December 15th, 1936.

Very truly yours,
FIDELITY & GUARANTY
FIRE CORPORATION,
By ALLAN V. KELLY (signed)
Adjuster.

AVK:LO

I hereby reject the sum of $77.00 and the interest mentioned above.

RAY R. GREENWOOD (signed) [6]

[Endorsed]: Filed Feb. 18, 1937.

[7]

[Title of Superior Court and Cause.]

NOTICE.

To: Mr. Ray R. Greenwood, 201 Bremerton Trust & Savings Bank, Bremerton, Washington, Attorney for the Plaintiffs.

Notice is hereby given that the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, in the above entitled cause, will, on the 8th day of February, A. D. 1937, at the hour of 10:30 A. M. of said day file in the Superior Court of the State of Washington in and for Kitsap County, sitting in and for the County of Kitsap, in said State in which said suit is now pending, its Petition and Bond for the Removal of said cause from said State Court to the District Court of the United States in and for the Western District of the State of Washington, and the Northern Division thereof.

DAVIS AND GROFF
Attorneys for Defendant:
FIDELITY AND GUARANTY FIRE CORPORATION OF BALTIMORE, MARYLAND.

Office and P. O. Address: 1333 Dexter Horton Bldg., Seattle, Washington.

Copy Received together with copies of Petition and Bond this 6th day of Feb., 1937.

RAY R. GREENWOOD
Atty. for Plf.

[Endorsed]: Filed Feb. 8, 1937. Reina M. Osburn, Clerk. By Arthur Lund, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 18, 1937. Edgar M. Lakin, Clerk, By S. Cook, Deputy. [8]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

To: The Honorable Judge of the Superior Court of the State of Washington, in and for Kitsap County:

Comes now the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, and files this, its Petition for Removal of this case from the aforesaid Superior Court of the State of Washington in and for Kitsap County, in which it is now pending, to the District Court of the United States in and for the Western District of Washington, Northern Division thereof, held in the City of Seattle, in said District and State.

And for ground of such removal your petitioner would show unto your Honor:

1. That service of Summons and Complaint in this action was made upon the Hon. William A. Sullivan, Insurance Commissioner for the State of Washington, on the 11th day of January, A. D. 1937, and that under the laws in force in the State of Washington this defendant has forty (40) days from the date of such service in which to plead, answer or demur to the plaintiffs' Complaint, and that the time for this defendant to plead, answer or demur to the same has not expired under the laws of this State [9] in such case made and provided.

2. That the suit is one of a civil nature at common law of which the district courts of the United States have original jurisdiction in that the suit is one to recover the sum of Four Thousand ($4,00.00) Dollars, together with interest and costs, upon a certain policy of fire insurance issued by the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, to William E. Bilquist, one of the plaintiffs herein, in which said policy of fire insurance, and in the recovery thereof, the said plaintiffs, John Myhre and Signe Myhre, claim an interest.

3. That the matter in dispute exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

4. That at the time of the commencement of this suit and ever since, the plaintiffs, and each and all of them, were and still are citizens and

residents of the State of Washington and of the county of Kitsap in said State.

And the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, asking this removal, was, at the time of the commencement of this suit and ever since has been, and now is, a corporation duly organized and existing under the laws of the State of Maryland having its principal office and place of business in the city of Baltimore, in said state of Maryland, and at all said times was and still is a citizen of the State of Maryland.

That the defendant, F. E. Langer, is a resident of the County of Kitsap, aforesaid, and a citizen of the State of Washington.

That there exists and is set forth in the Complaint of the plaintiffs in the above entitled action a separate and separable controversy between the plaintiffs and the defendant, F. E. Langer, from that existing and set forth in said Complaint [10] between the plaintiffs and this defendant, your petitioner. That the controversy arising in this suit between the plaintiffs and this defendant, your petitioner, aises solely out of the alleged right of the plaintiffs to recover of the defendant, your petitioner, upon a written policy of fire insurance issued by this defendant to the plaintiff, William E. Bilquist, in which the other named plaintiffs claim some interest in the policy and in the recovery sought in this suit.

That the defendant, F. E. Langer, is not a party, either as insured or insurer, to said policy of insurance, and is not liable thereon, and that the con-

troversy existing between the plaintiffs and the defendant, F. E. Langer, set forth and alleged in said suit or action, arises solely out of the alleged negligence and want of due care on the part of the said F. E. Langer in acting as agent of the said plaintiffs and as the agent of the Kitsap County Bank, a banking corporation.

That the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, your petitioner, is liable, if liable at all, only upon its contract of insurance evidenced by its written policy thereof, and that the defendant, F. E. Langer, is not liable to the plaintiffs upon such contract of fire insurance, and that, therefore, there exists as to the defendant, your petitioner, a separate and separable controversy between it and the plaintiffs from that existing between the defendant, F. E. Langer, and the plaintiffs.

That as between the plaintiffs and this defendant the controversy existing in this cause of action can be wholly determined between them both as to the issues of law and fact without affecting the interests of the defendant, F. E. Langer, or without affecting the right of the plaintiffs to recover against the defendant, F. E. Langer, upon the controversy existing between them. [11]

Your petitioner herewith files a good and sufficient bond under the statute in such case made and provided, conditioned as the law directs, and he will, within thirty (30) days from the filing of the Petition for Removal, file a certified copy of the record of the case in the District Court of the United

States for the Western District of Washington, Northern Division, and for the payment of all costs which may be awarded by said Court, if said District Court shall determine that this suit was improperly and wrongfully removed thereto.

Your petitioner therefore prays to the Court that it proceed no further herein except to order the removal, accept the bond herewith presented, and direct a transcript of the record to be made and certified as provided by law.

DAVIS AND GROFF
Attorneys for Petitioner.

State of Washington,
County of King—ss.

I, Guy B. Groff, being first duly sworn on oath, depose and say: That I am a citizen of the United States of America, a resident of King County in the State of Washington, and a citizen of the State of Washington, of full and lawful age. That I am one of the attorneys for the petitioner, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, for the removal of the above entitled cause to the District Court of the United States, as prayed for in its said Petition.

That the said Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, is a corporation organized and existing under the laws of the State of Maryland, having its principal office and place of business in the State of Maryland; and that said corporation is absent from the State of Wash-

ington and has [12] no officer thereof within the State of Washington authorized to make this verification; and that I make this verification for and in its behalf for the reason aforesaid.

That I have read the foregoing Petition; that the allegations of said Petition are true of my own knowledge except that stated on information and belief, and to that extent I believe them to be true.

GUY B. GROFF

Subscribed and Sworn to before me this 5th day of February, 1937.

[Seal] MERVYN F. BELL

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in U. S. District Court, Feb. 18, 1937.

[13]

[Title of Superior Court and Cause.]

BOND ON REMOVAL TO THE DISTRICT COURT.

Know All Men By These Presents: That we, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, as principal, and United States Fidelity & Guaranty Co. of Baltimore, Maryland, a surety company organized and existing under the laws of the State of Maryland, and authorized to transact a surety business within the State of Washington, as surety, are held and firmly bound unto the plaintiffs in the above en-

titled cause, William E. Bilquist, John Myhre and Signe Myhre, in the sum of Five Hundred ($500.00) Dollars lawful money of the United States of America for the payment of which, well and truly to be made, we, and each of us, bind ourselves and each of our successors, representatives and assigns, jointly and severally by these presents.

The conditions of this obligation are such that whereas the said Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, principal herein, has applied by petition to the Superior Court of the State of Washington for Kitsap County for the removal of a certain cause wherein William E. Bilquist, John Myhre and Signe Myhre are plaintiffs, and Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation engaged in the business of writing fire insurance in the State of Washington, being organized and existing under and by virtue of the laws of the State of Maryland, and a citizen and resident of said state, is a defendant, and F. E. Langer, a citizen of the State of Washington, is also a defendant, to the District Court of the United States for the Western District of Washington, Northern Division, for [14] further proceedings on the grounds in said Petition set forth, and that all further proceedings in said action in said Superior Court be stayed.

Now, Therefore, if your petitioner, the said Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, shall enter in said District

Court of the United States for the Western District of Washington, Northern Division aforesaid within thirty (30) days from the date of the filing of said petition a certified copy of the record of such suit, and shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States, and if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

Dated February 5th, 1937.

FIDELITY AND GUARANTY FIRE CORPORATION OF BALTIMORE, MARYLAND, a corporation,

By: DAVIS and GROFF
Its Attorneys.

[Corporate Seal] UNITED STATES FIDELITY & GUARANTY CO.

By JOHN C. McCOLLISTER
Attorney-in-fact.

Bond approved.

JAMES T. LAWLER
Judge.

[Endorsed]: Filed Feb. 8, 1937. Reina M. Osburn, Clerk. By Arthur Lund, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 18, 1937. Edgar M. Lakin, Clerk, By S. Cook, Deputy.

[15]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL.

This cause coming on for hearing upon the petition of the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, for an order removing this cause to the District Court of the United States for the Western District of Washington, Northern Division, and it appearing to this Court that the said defendant has filed its petition for such removal in due form and within the required time and that said defendant has filed its bond duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition had, prior to the filing thereof, been served upon the plaintiffs herein, which notice the Court finds is sufficient and in accordance with the requirements of the statute, and it appearing to the Court that this is a proper cause for removal to said District Court of the United States,

Now, Therefore, the said petition and bond are hereby accepted, and it is hereby ordered that this cause be and it is hereby removed to the District Court of the United States for the Western District of Washington, Northern Division, and that all other proceedings be stayed, and the Clerk is hereby directed to make up [16] the record in said cause for transmission to said court forthwith.

Done in Open Court this 8th day of February, 1937.

JAMES T. LAWLER
Judge.

Presented by:

GUY B. GROFF
of DAVIS and GROFF, 1333 Dexter Horton Bldg., Seattle, Wash.
Attorneys for defendant: Fidelity and Guaranty Fire Corporation of Baltimore, Maryland.

[Endorsed]: Filed Feb. 8, 1937. Reina M. Osburn, Clerk. By Arthur Lund, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 18, 1937. Edgar M. Lakin, Clerk, By S. Cook, Deputy.

[17]

In the District Court of the United States for the Western District of Washington.

No. 21098

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Plaintiffs,

vs.

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, Maryland, a corporation engaged in the business of writing fire insurance in the State of Washington, and F. E. LANGER,

Defendants.

ANSWER OF FIDELITY AND GUARANTY FIRE CORPORATION.

Comes now the defendant Fidelity and Guaranty Fire Corporation by Davis and Groff, its attorneys, and appearing and answering for itself, and not for or in behalf of any other defendant, and answering the complaint of the plaintiffs in the above entitled action says:

I.

The defendant denies that the plaintiffs William E. Bilquist, John Myhre and Signe Myhre, were a community and as such were the joint owners of the real estate in Kitsap County described in paragraph numbered I in plaintiffs' complaint.

Further answering thereto, this defendant says that on the 10th day of August, 1935, one Bessie Bilquist was and still is the lawful wife of the plaintiff William Bilquist and that the said William Bilquist and Bessie Bilquist, on the day and year last aforesaid constituted and still constitute a marital community, and such interest as the plaintiff William Bilquist then had therein was not his sole and separate property but was the property of such community.

That this defendant further admits that on the 10th day of August, A. D. 1935, there was situated on the said described property a building sometimes known as Manchester Inn, and used as an Inn; [18] and further this defendant denies each and every allegation of paragraph numbered I of said complaint not hereinabove expressly admitted.

II.

This defendant admits that it is a corporation organized and existing under the laws of the State of Maryland with license to transact business and write policies of fire insurance under and pursuant to the laws of this state, but it avers that its true and correct name is Fidelity and Guaranty Fire Corporation.

This defendant admits that the defendant F. E. Langer at all times mentioned in the plaintiffs' complaint was, and still is, the president of the Kitsap County Bank, a banking corporation at Port Orchard, Kitsap County, Washington.

This defendant admits that on the 10th day of August, A. D. 1935, the defendant F. E. Langer was, and for some time theretofore had been, a soliciting agent for this defendant at Port Orchard aforesaid, for the purpose of and having authority to solicit, secure and submit to this defendant applications for policies of fire insurance.

This defendant denies that the said F. E. Langer, was at any of the times in the plaintiffs' complaint mentioned a general agent of or for this defendant, and this defendant denies each and every allegation of fact in said paragraph numbered II of the plaintiffs' complaint contained and not hereinabove by this defendant in this paragraph expressly admitted.

III.

This defendant admits that on or about the 10th day of August, A. D. 1935, the defendant F. E. Langer for the protection of the Kitsap County Bank of which he was then president, on his own motion and at his own instance made and forwarded to this defendant application for insurance on the property described in the [19] plaintiffs' complaint in the name of William Bilquist as a dwelling house with loss if any payable to the Kitsap County Bank as its interest might appear; that acting upon such application this defendant did issue and forward to the said F. E. Langer its policy of insurance, numbered 28222, wherein among other things it was recited and set forth that this defendant did insure William Bilquist as the owner of the build-

ing situated on said premises against loss by fire in the sum of two thousand five hundred dollars while occupied only for dwelling house purposes, and did insure the said William Bilquist against loss by fire of the household furnishings and personal effects only while contained in the said building and while said building was used only for dwelling house purposes, and that said policy was by the said Langer delivered to the Kitsap County Bank.

This defendant admits that it was recited in said policy that in case of loss the insurance upon the building only, and not upon the household furnishings and personal effects, should be payable first to the Kitsap County Bank, first mortgagee, secondly to Clarence Jones, second mortgagee, and thirdly to John and Signe Myhre, third mortgagees, as their several interests might appear.

As to the other matters and things in the said paragraph numbered III of the plaintiffs' complaint not hereinabove in this paragraph expressly admitted, this defendant denies the same and each, every and all thereof.

IV.

This defendant admits that on the 12th day of September, A. D. 1936, the building on said premises and some of the personal property therein situated were destroyed by fire and that on the 3d day of December, A. D. 1936, an instrument purporting to be a proof of loss and to have been executed by the plaintiffs, claiming a total loss on said property

and furniture of $4,000.00, was [20] forwarded to this defendant.

This defendant denies each and every allegation and alleged fact set forth in paragraph numbered IV of the plaintiffs' complaint not hereinbefore in this paragraph expressly admitted.

V.

This defendant admits the allegations of paragraph numbered V of the plaintiffs' complaint.

VI.

This defendant admits that it rejected such proof of loss in part because said policy was void because it was, and was operated as, an inn or tavern and place for the sale of beer and other intoxicating liquors, and was not used solely for a dwelling, and in part because the interest of the insured in the property was not truly stated in the policy, and that the interest of the insured was other than unconditional ownership, and in part because the hazard, within the meaning of the policy, had subsequent to the issuing of said policy been increased by means which were within the knowledge and control of the insured, and in part because such proof of loss was not rendered to this defendant within 60 days next after such loss occurred.

That each and every allegation of, or contained in, said paragraph numbered VI of the plaintiffs' complaint not hereinabove in this paragraph expressly admitted is denied.

And by way of further answer and as a first affirmative defense the defendant Fidelity and Guaranty Fire Corporation alleges and says:

I.

That at all times hereinafter mentioned the plaintiffs William E. Bilquist and Bessie Bilquist were and still are husband and wife, and constituted and still constitute a marital community [21] under the laws of the State of Washington.

That at all times mentioned the plaintiffs John Myhre and Signe Myhre were and still are husband and wife and constituted and still constitute a marital community under the laws of Washington.

II.

That at all times hereinafter mentioned the real estate and premises, with the buildings and improvements thereon, including the building described in and assumed to be covered by the policy of insurance set forth in the plaintiffs' complaint, and being known and described as lots 1 and 2 of block 4, and lots 8 and 9 in block 5, of Davis Addition to Manchester, Washington, was the property of and owned by the marital communities of William Bilquist and wife, and John Myhre and wife, as tenants in common.

That the policy of fire insurance issued by this defendant in the name of the plaintiff William Bilquist on the 10th day of August, A. D. 1935, and referred to and described in the plaintiffs' com-

plaint, covered a two-story, shingle roof, frame building while occupied only for dwelling house purposes, and certain household and personal effects only while contained in the above described dwelling house building, and said policy of fire insurance purported to insure, and this defendant agreed to insure the plaintiff William Bilquist against loss by fire of the aforesaid two-story frame building, in the sum of and to the extent of twenty-five hundred dollars, only while said building was occupied and used only and solely for dwelling house purposes, and not otherwise, and said policy of insurance purported to insure, and this defendant thereby agreed to insure, the household furnishings and personal effects of the said William Bilquist against loss by fire in the sum of and to the extent of fifteen hundred dollars, only while said furniture and household effects were contained in the above [22] described two-story building, and only while and so long as the said above named two-story frame building was occupied and used only and solely for dwelling house purposes, and not otherwise.

III.

That this defendant, at the time of issuing said policy of fire insurance did not have, nor did it have at any time prior to the 13th day of September, A. D. 1936, nor prior to the time of the destruction of said building by fire as alleged in paragraph numbered IV of plaintiffs' complaint, any knowledge, notice or information of, and did not know, of the

fact that said building was not occupied only for dwelling house purposes.

IV.

That the defendant F. E. Langer on the 10th day of August, A. D. 1935, resided at Port Orchard in said county, and for some time theretofore had acted as a soliciting agent for this defendant, at Port Orchard, for the purpose of and having authority to solicit and obtain and submit to this defendant applications for policies of fire insurance.

V.

That on the 10th day of August, A. D. 1935, the said two-story, shingle-roof, frame building mentioned in the policy of insurance hereinbefore described, and attempted to be covered and insured by said policy of insurance against loss by fire only while and so long as occupied only and solely for dwelling house purposes, was, and for a long time theretofore had been, and until its destruction by fire on the 12th day of September, A. D. 1936, as hereinbefore set forth, continued to be occupied and used for business purposes and in particular as a hotel, inn or lodging house, and as a place where meals and lodgings were furnished and sold to the public generally for compensation. That no permit was ever issued by this defendant for the occupation and use of said premises for business [23] purposes, nor otherwise than solely as a dwelling and for dwelling house purposes only, and this defendant did not consent thereto.

VI.

That the defendant F. E. Langer was at all times herein mentioned, and still is, president and managing officer of the Kitsap County Bank, a banking corporation existing under the laws of the State of Washington, and located at Port Orchard, aforesaid, and at all times owning and controlling a majority of the shares of the capital stock of such banking corporation, and being at all times in control of said bank.

VII.

That the plaintiffs acquired the title to the insured property from one Joseph Hass of Port Orchard on or about the 25th day of July, A. D. 1935, and that the arrangement or deal for the purchase of such property was consummated through and by the aid and assistance of the defendant F. E. Langer and through and by the aid and assistance of the said Kitsap County Bank, and the said Kitsap County Bank, with the knowledge and approval of the defendant F. E. Langer, advanced to the plaintiffs, for the purpose of consummating the purchase of such property, a large sum of money, to-wit, the sum of twenty-one hundred dollars, and that on the 10th day of August, A. D. 1935, the plaintiffs were indebted to the said Kitsap County Bank in a large sum of money, to-wit, the sum of twenty-one hundred dollars, loaned and advanced to the plaintiffs for the purpose of securing the title to said property, and which was secured, in whole or in part, by a mortgage on said premises.

VIII.

That at the time said property was acquired by the plaintiffs the insurance thereon consisted of and was limited to the sum of one thousand dollars upon the building on said property and the sum of one thousand dollars upon the household furnishings and [24] personal property therein.

That the defendant F. E. Langer at all times well knew that the building situated on the premises hereinbefore described was not occupied or used for dwelling house purposes only, and well knew that such building was old and of little value and that it had been built in or about the year 1908, and well knew the amount of the insurance then upon said property, and well knew that the entire premises, including said household furnishings and personal effects and including said building and including the real estate whereon the same had been situated, had been acquired by the plaintiffs in the month of July, 1935 for the purchase price or sum of three thousand five hundred dollars, and the said F. E. Langer then, to-wit, on August 10, 1935, and at all other times herein mentioned, well knowing that said building was fairly and reasonably worth not to exceed the sum of one thousand dollars, and well knowing that the plaintiffs were using and occupying the building on said premises for business purposes and as a hotel, inn or lodging house, and as a place where meals and lodgings were offered and sold to the public, and not for dwelling house purposes only, and well knowing that said

household furnishings and personal effects were fairly worth not to exceed the sum of one thousand dollars, and well knowing that the same were not kept or contained in any building used solely and only for dwelling house purposes, and well knowing that said described property was an unsafe and undesirable risk for fire insurance, and well knowing that this defendant would not insure the said property against loss by fire if it were known to this defendant that said property was used for other than dwelling house purposes solely, and for the purpose of obtaining insurance thereon to protect the said Kitsap County Bank against any loss in the event of the destruction of such property by fire, caused the cancellation of the insurance then [25] existing, made application to this defendant for the issuance of a policy of fire insurance upon said building as a building used for dwelling house purposes only in the sum of twenty-five hundred dollars, and upon the household furnishings and personal effects contained in the building used for dwelling house purposes only in the sum of fifteen hundred dollars, with the loss upon the building, if any, payable to the said Kitsap County Bank as first mortgagee, as its interest might appear, and the balance, respectively, to Clarence Jones, second mortgagee, and to John Myhre and Signe Myhre, third mortgagees, as their interests might appear. That in all matters and things connected with the making of such application and in the issuance of said policy, and in connection with, or relating

thereto, the defendant F. E. Langer, while pretending to act as the soliciting agent of this defendant, in truth and fact acted for and in his own interest and for and in behalf of the interests of the said Kitsap County Bank, and in his own interest and in the interest of the Kitsap County Bank misrepresented, falsely stated and fraudulently concealed from this defendant the true facts as to the ownership and the use and occupancy of said insured premises as aforesaid. That thereupon this defendant, not knowing that the said property was used as a hotel or inn or as a place for the furnishing and sale of meals and lodgings to the public, and not knowing the value of such property, and not knowing of the interest of the said F. E. Langer in said property, and not knowing that the said F. E. Langer was acting in his own behalf and in behalf of the said Kitsap County Bank and not for and in behalf of this defendant, and relying upon the statements and representations made by the said F. E. Langer to this defendant in such application as aforesaid, issued the said policy hereinbefore described. [26]

IX.

That said policy was and is void and of no effect, for the reason that the building purporting to be insured thereby and the building in which the household furnishings and personal effects were to be contained and were contained, was not at the time of the issuance of said policy, nor at any other time, nor at the time of the destruction of

said property by fire, occupied only for dwelling house purposes, and that the issuance of said policy was obtained by the false and fraudulent representations of the said F. E. Langer as aforesaid, and acting in his own interests and behalf and in behalf of the Kitsap County Bank as aforesaid.

X.

That upon learning and being informed that the said described building had been and was, at the time of the issuance of said policy and at the time of its destruction by fire, occupied and used for other than dwelling house purposes, this defendant tendered to the plaintiffs the sum of eighty-three and 25/100 dollars, the same being the true and full amount of the premium received by this defendant, as consideration for the issuance of such policy and for this defendant's undertaking thereunder, and the interest on the amount of such premium at the rate of six per cent per annum from the 10th day of August, A. D. 1935, the date of such tender.

And by way of further answer and as a second affirmative defense the defendant Fidelity and Guaranty Fire Corporation alleges and says:

I.

That it was specifically provided and set forth in the policy of fire insurance issued by this defendant in the name of William [27] Bilquist as insured on the 10th day of August, A. D. 1935, and being the same policy of fire insurance alleged by the

plaintiffs in their complaint, and in paragraph numbered III thereof, to have been issued on the 10th day of August, A. D. 1935 by this defendant, and identified as policy numbered 28222 and running to the plaintiff William Bilquist as the insured, and a part of the stipulations, covenants, conditions and agreements thereof, that the entire said policy of insurance, unless otherwise provided by agreement endorsed on or added to said policy, should be void if the interest of the assured be other than unconditional and sole ownership, or if the interest of the insured be not truly stated in such policy. That no agreement otherwise providing was ever entered into by the defendant with the insured, nor with any other person, and no such agreement was ever indorsed upon said policy of insurance, nor at any time added thereto.

II.

That in and by said policy of insurance it was stated and warranted by the insured that the title to the insured property was in the insured, William Bilquist, and it was covenanted and agreed in said policy and accepted and agreed by the insured as a condition of such insurance that such statement was a statement of fact known to and warranted by the insured to be true, and that the policy was issued by this defendant in reliance upon the truth of such statement, and that if such statement was untrue, then in that event the policy should be void.

That the said policy of insurance was issued and

accepted subject to the statement, condition and stipulation aforesaid.

III.

That the two-story frame building, insured by said policy, and the building in which the said household furniture and personal effects were to be contained while subject to and covered by said [28] policy of insurance, on the 10th day of August, A. D. 1935, at the time of the issuance of said policy, was, and for a long time theretofore had been, and thereafter until its destruction by fire on September 12th, 1936, continued to be, located on lots 1 and 2 of Block 4 and lots 8 and 9 of Block 5 of Davis Addition to Manchester, Washington, or some part thereof, and that said real estate hereinbefore in this paragraph described, and the buildings and improvements thereon, at all said times was owned by the marital community consisting of the said William Bilquist and Bessie Bilquist, his wife, and by the marital community consisting of John Myhre and Signe Myhre, his wife, as tenants in common, and that the said William Bilquist was not at the time of the issuance and accepting of said policy and was not at the time of the destruction of said property on September 12th, 1936, nor at any other time, the sole and unconditional owner of said real estate, or of the buildings and improvements thereon, nor of the two-story, shingle-roof, frame building described in said policy of insurance, nor of the household furnishings and personal effects contained therein.

IV.

That portions of the household furnishings situated in the building described in said policy of insurance and located on the property hereinbefore mentioned, on the 10th day of August A. D. 1935, and at the time of the issuing of said policy of insurance, and then situated and located in said building, and at the time of the destruction thereof by fire on the 12th day of September A. D. 1936, were not on said 10th day of August A. D. 1935, nor at any of said times, owned by the said insured nor by the plaintiffs nor any thereof, and that the household furnishings, consisting of certain range or ranges, certain refrigerator or refrigerators, and certain circulator or circulators, were acquired by the plaintiffs fom the Mitchell Sales Corporation on or prior to the 1st day of [29] August A. D. 1935, by means of and under a contract of conditional sale, wherein and whereby the title thereto was reserved and retained in the Mitchell Sales Corporation until full payment of the purchase price, and that full payment of the purchase price had not been made on the 10th day of August 1935, nor prior to the 13th day of September A. D. 1936, and that during all of said times the title of the said household furnishings was in the Mitchell Sales Corporation and not in the plaintiff, nor in any of the plaintiffs, and that the title of the said insured thereto was not at the time of the issuing of said policy, nor at the time of the destruction of said property by fire, the unconditional and sole owner-

ship required by the terms and conditions of said policy.

V.

That this defendant did not have at the time of the issuance of said policy, nor at any other time preceding the destruction of such property by fire, any knowledge, information, notice or belief that the title to the insured property was not in the name of the plaintiff William Bilquist, the insured in said policy, or that the interest of the plaintiff William Bilquist in the insured property was not that of unconditional and sole ownership.

VI.

That by reason of the false representation and breach of the conditions of said policy that the title to the insured property was in the plaintiff as the insured, and that his interest therein was that of unconditional and sole ownership, and because the interest of the assured was not truly stated therein, the said policy was and is null and void and of no effect.

VII.

That subsequently, and after the destruction of said building and of the household furnishings and personal effects by fire, and on, to-wit, the 17th day of December A. D. 1935, this defendant [30] tendered to the plaintiffs the sum of eighty-three dollars and twenty-five cents ($83.25), the same being the true and full amount of the premium paid to this defendant, as compensation for the issuance of the said policy and for its undertaking there-

under, and of the interest on the amount of such premium at the rate of six per cent per annum from the 10th day of August 1935 to the day of such tender.

And by way of further answer and as a third affirmative defense the defendant Fidelity and Guaranty Fire Corporation alleges and says:

I.

That heretofore on the 10th day of August A. D. 1935, this defendant issued its policy of insurance insuring the said plaintiff for the period of three years from said day and year against loss sustained by him from the destruction by fire, to the extent of two thousand five hundred dollars, of the two-story, shingle-roof, frame building situated on lots 1 and 2 of Block 4 and lots 8 and 9 of Block 5 of Davis Addition to Manchester, Washington, or some part thereof, while occupied only for dwelling house purposes, and to the extent of fifteen hundred dollars against loss sustained by him by reason of the destruction by fire of the household furnishings and personal effects contained in the above described dwelling house building, the same being policy No. 28222, and being the same policy referred to by the plaintiffs in paragraph numbered III of their complaint in this action.

II.

That on the 10th day of August A. D. 1935, and at the time of the issuance by this defendant of such policy, the building attempted to be covered by such

policy of insurance and described therein was not then being occupied only for dwelling house [31] purposes as provided and limited in said policy, but then was, and for a long time theretofore had been by the said insured used and occupied as a place of business, and particularly as an inn or hotel under the name of Manchester Inn, where meals and lodgings were offered and furnished to the public for compensation, which said occupancy for business purposes was at all times prior to September 12th, 1936 unknown to this defendant.

III.

That thereafterwards, and on or about the 26th day of March A. D. 1936, and subsequent to the issuance of said policy of insurance, and prior to the destruction of said building by fire on September 12th, 1936, one Ervin Moen, who, this defendant is informed and believes and therefore so avers, was an employee, co-partner, lessee of or joint adventurer with the plaintiffs, filed with the Washington State Liquor Control Board an application for a beer and wine license authorizing and licensing the sale of beer and wines upon the said premises and in the building then known as Manchester Inn, and being the same building described in and covered by said policy of insurance issued by this defendant in the name of the plaintiff William Bilquist.

That thereupon and on April 6, 1936 licenses for the sale of beer and wines on said premises, both for consumption on said premises and for consumption off said premises, were by said Washington State

Liquor Control Board issued to the said Ervin Moen, licensing and authorizing the sale of beer and wines upon said premises and in the building covered by said policy of insurance.

And this defendant further says that after said 6th day of April A. D. 1936, and continuously thereafter and until the destruction of said building by fire, portions of said building were used for and occupied as a public beer and wine parlor or salesroom for the sale and dispensing of beer and wine to the public generally, [32] to be consumed on said premises, and for a public dance and music hall where public dancing to music was permitted and allowed for compensation, and in which the sale of beer and wine and the drinking thereof, and the dancing, continued until late hours, and such building had not been, prior to said day and year last aforesaid, so used or occupied.

That such use of the premises was well known to the plaintiffs and each and all of them, and as this defendant is informed and believes, and therefore so avers, was conducted and carried on by the plaintiffs for their benefit, profit and advantage, either personally or through the said Ervin Moen as their agent or employee, or representative, or as a joint adventurer.

That the use of said building or portions thereof for the sale of beer and wine for consumption on said premises, together with the use of the said building, or portions thereof for a place of public dancing, and open to the public as a place of danc-

ing, caused large numbers of persons to frequent and make use of said building as a place of public resort, and as a place for smoking, dancing and the drinking of wine and beer, and to continue such smoking, dancing and drinking until late hours of the night or the early hours of the morning, and such use greatly increased the hazard and liability to destruction by fire over the hazard and liability incident to the occupancy of said building as an inn or hotel, and very greatly increased the hazard and liability to destruction by fire over that to which it was subjected by occupancy for and use solely as a dwelling house.

That the application for such license to sell and vend beer and wines and the granting of licenses therefor, and the use of said building, or portions thereof, for the purpose of selling and vending wines and beer and for public dancing and as a place of public resort for such purposes, was to this defendant wholly [33] unknown, and this defendant did not and has not at any time consented thereto.

That said insured premises were situated in Manchester, Washington, which was and is a small, unorganized community without organized local government and without police protection, and without adequate, or any, protection against fire.

That the use of said building as a place for the sale of beer and wines to be consumed on the premises, and as a place of public resort for smoking, dancing and drinking of beers and wines, rendered said insured building a hazardous, undesir-

able and uninsurable risk, and had such use been made known to this defendant it would have refused to continue such insurance and would have cancelled such policy.

That it is provided and set forth in said policy of insurance, and one of the stipulations and conditions upon which said policy was issued and to which it is and at all times was subject, that the entire policy should be void, unless otherwise provided by agreement endorsed thereon or added thereto, if the hazard of such insurance be increased by any means within the knowledge or control of the insured.

That no agreement otherwise was ever made or endorsed upon such policy of insurance, and such use and increased hazard was not consented to by this defendant and was to it unknown until after the destruction of said building by fire. That such increase in hazard by the use of portions of said building as a place for vending and sale of beers and wines for consumption on the premises and as a place of public resort for smoking, drinking and for dancing was within the control and knowledge of the insured.

That by reason of the violation of the terms, conditions and stipulations of such policy of insurance and by an increase of the hazard by means within the knowledge and control of the insured, [34] as aforesaid, the said policy became and was and is null and void and of no effect.

That subsequently and after the destruction of said building and of said household furnishings and

personal effects by fire, and on, to-wit, the 17th day of December A. D. 1935, this defendant tendered to the plaintiffs the sum of eighty-three dollars and twenty-five cents ($83.25), the same being the true and full amount of the premium paid to this defendant as compensation for the issuance of said policy and for its undertaking thereunder, and of the interest on the amount of such premium, at the rate of six per cent per annum from the 10th day of August A. D. 1935, to the day of such tender. [35]

Wherefore this defendant prays that the plaintiffs take nothing by their said action and that judgment be entered in favor of this defendant, and that this defendant recover its costs and disbursements.

Dated March 31st A. D. 1937.

FIDELITY FIRE AND
GUARANTY CORPORATION
By DAVIS AND GROFF
Its Attorneys

DAVIS AND GROFF
Attorneys for Defendant
Fidelity and Guaranty Fire Corporation
1333 Dexter Horton Building
Seattle, Washington. [37]

State of Washington
County of King—ss.

I, Guy B. Groff, being first duly sworn, on oath depose and say:

That I am a resident of the city of Seattle in the County of King and State of Washington, of

full and lawful age, a citizen of the United States of America, and one of the attorneys for the defendant Fidelity and Guaranty Fire Corporation in the above entitled action.

That the defendant Fidelity and Guaranty Fire Corporation is a corporation organized and existing under and by virtue of the laws of the State of Maryland and having its principal office and place of business at the City of Baltimore in such state of Maryland, and that it has no agent or officer within the State of Washington authorized to make this verification. That for the reasons aforesaid I make this verification as the attorney of the said Fidelity and Guaranty Fire Corporation and for and in its behalf.

That I have read the foregoing answer and know the contents thereof, and that the matters and things therein stated and set forth are true in fact, as I verily believe.

GUY B. GROFF

Subscribed and Sworn to before me by the above named Guy B. Groff in the City of Seattle in said County, this 31st day of March A. D. 1937.

[Seal] MERVYN F. BELL

Notary Public in and for the State of Washington, residing at Seattle.

Copy received Apr. 9, 1937.

RAY R. GREENWOOD

By F. M.

Atty. for Plaintiff.

[Endorsed]: Filed Apr. 10, 1937. [38]

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs and in reply to the affirmative defenses, set forth in the answer of the Fidelity and Guaranty Fire Corporation, admit, deny, and state as follows:

I.

Replying to Paragraph II of the first affirmative defense, plaintiffs deny the same, and each and every allegation therein contained, subject only to the admissions and allegations set forth and contained in the complaint herein.

II.

Replying to Paragraph III, plaintiffs deny each and every allegation contained therein.

III.

Replying to Paragraph IV, plaintiffs admit the same and allege that the said F. E. Langer was also general agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore and entitled to subscribe and deliver policies without first submitting any application therefor to any person.

IV.

Replying to Paragraph V, plaintiffs admit that said building was described as a dwelling house in the policy herein and that the furnishings were situated in said building; also admit that said building was used as an inn, but re-allege, as in the com-

plaint herein, that said fact was within the knowledge of the defendants and their agent, and that the description in said policy was placed there on the initiative of the defendants themselves.

V.

Replying to Paragraph VI, plaintiffs admit the same. [39]

VI.

Replying to Paragraph VIII, plaintiffs deny each and every allegation therein contained, except the plaintiffs admit that the said F. E. Langer, as the agent of the defendant Fidelity and Guaranty Fire Corporation, knew that the building described in the policy was used as a hotel and an inn; and plaintiffs further admit that the said F. E. Langer, as agent of this defendant Fidelity and Guaranty Fire Corporation, knew that the personal property described in said policy was kept in a building not used for dwelling house purposes; and plaintiffs further admit that the policy was made payable to the Kitsap County Bank, as in said paragraph alleged, and to Clarence Jones, second mortgagee, and to John Myhre and Signe Myhre, third mortgagees, as their interest might appear; and plaintiffs further admit that all matters and things connected to the making of the same and the insurance of said policy were all known to F. E. Langer, agent of the defendant and acting in that capacity, and admit that the policy was issued by the plaintiffs on account of the application of F. E. Langer; and

further allege that said policy was issued and signed by him as agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, and that all things in connection with said matter had represented the defendants and not the plaintiffs, or any of them.

VII.

Replying to Paragraph IX, plaintiffs deny each and every allegation therein contained.

VIII.

Replying to Paragraph X, plaintiffs admit that the defendant tendered to plaintiffs the sum of eighty-three and 25/100 dollars ($83.25), as therein alleged:

For a Reply to the Second Affirmative Defense Herein, plaintiffs admit, deny, and allege as follows:

I.

Replying to Paragraph I, plaintiffs deny each and every allegation contained therein, except as may be admitted and qualified in the allegations of the complaint. [40]

II.

Plaintiffs deny each and every allegation contained in Paragraph II, except as may be qualified by the allegations of the complaint, and especially deny that any fraudulent act was done or alleged by plaintiffs, or any of them, in connection with the securing of this insurance.

III.

Replying to Paragraph III, plaintiffs deny each and every allegation therein contained, except as may be admitted and qualified by the allegations of the complaint.

IV.

Replying to Paragraph IV, plaintiffs deny the same and all the allegations therein contained.

V.

Replying to Paragraph V, plaintiffs deny each and every allegation therein contained.

VI.

Replying to Paragraph VI, plaintiffs deny each and every allegation therein contained.

VII.

Replying to Paragraph VII, plaintiffs admit the tender of $83.25, as therein alleged.

Further replying thereto and specially replying to the third affirmative defense of the Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, plaintiffs admit, deny, and allege as follows:

I.

Plaintiffs admit Paragraph I thereof.

II.

Replying to Paragraph II, plaintiffs admit the same, excepting that the plaintiffs deny that part thereof commencing with the word "which" at the end of the third line from the end of said paragraph to the end thereof.

III.

Replying to Paragraph III, plaintiffs admit the same, excepting that they deny that any of the acts or things done were without the knowledge of the defendants or their agent, but alleges [41] that they were within their knowledge at all times, and that the entire purposes for which said buildings was to be used were well known to the defendants, and all of them at all times on and since the date of the policy of insurance sued on herein. Plaintiffs further deny that anything done upon said premises materially increased the risk for insurance purposes, as in said paragraph alleged.

Wherefore, having fully replied herein, plaintiffs pray judgment as in the complaint.

RAY R. GREENWOOD
Attorney for Plaintiffs

State of Washington
County of Kitsap—ss.

John Myhre, being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

JOHN MYHRE

Subscribed and Sworn to before me this 3rd day of September, 1937.

RAY R. GREENWOOD
Notary Public in and for the State of Wash., residing at Bremerton.

[Endorsed]: Filed Sep. 22, 1937. [42]

[Title of District Court and Cause.]

AMENDED REPLY

Comes now the plaintiffs and in reply to the affirmative defenses, set forth in the answer of the Fidelity and Guaranty Fire Corporation, admit, deny, and state as follows:

I.

Replying to Paragraph II of the first affirmative defense, plaintiffs deny the same, and each and every allegation therein contained, subject only to the admissions and allegations set forth and contained in the complaint herein.

II.

Replying to Paragraph III, plaintiffs deny each and every allegation contained therein.

III.

Replying to Paragraph IV, plaintiffs admit the same and allege that the said F. E. Langer was also general agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore and entitled to subscribe and deliver policies without first submitting any application therefor to any person.

IV.

Replying to Paragraph V, plaintiffs admit that said building was described as a dwelling house in the policy herein and that the furnishings were situated in said building; also admit that said building was used as an inn, but re-allege, as in the com-

plaint herein, that said fact was within the knowledge of the defendants and their agent, and that the description in said policy was placed there on the initiative of the defendants themselves.

V.

Replying to Paragraph VI, plaintiffs admit the same. [43]

VI.

Replying to Paragraph VIII, plaintiffs deny each and every allegation therein contained, except the plaintiffs admit that the said F. E. Langer, as the agent of the defendant Fidelity and Guaranty Fire Corporation, knew that the building described in the policy was used as a hotel and an inn; and plaintiffs further admit that the said F. E. Langer, as agent of this defendant Fidelity and Guaranty Fire Corporation, knew that the personal property described in said policy was kept in a building not used for dwelling house purposes; and plaintiffs further admit that the policy was made payable to the Kitsap County Bank, as in said paragraph alleged, and to Clarence Jones, second mortgagee, and to John Myhre and Signe Myhre, third mortgagees, as their interest might appear; and plaintiffs further admit that all matters and things connected to the making of the same and the insurance of said policy were all known to F. E. Langer, agent of the defendant and acting in that capacity, and admit that the policy was issued by the plaintiffs on account of the application of F. E. Langer; and

further allege that said policy was issued and signed by him as agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, and that all things in connection with said matter had represented the defendants and not the plaintiffs, or any of them.

VII.

Replying to Paragraph IX, plaintiffs deny each and every allegation therein contained.

VIII.

Replying to Paragraph X, plaintiffs admit that the defendant tendered to plaintiffs the sum of eighty-three and 25/100 dollars ($83.25), as therein alleged:

For a Reply to the Second Affirmative Defense Herein, plaintiffs admit, deny, and allege as follows:

I.

Replying to Paragraph I, plaintiffs deny each and every allegation contained therein, except as may be admitted and qualified in the allegations of the complaint. [44]

II.

Plaintiffs deny each and every allegation contained in Paragraph II, except as may be qualified by the allegations of the complaint, and especially deny that any fraudulent act was done or alleged by plaintiffs, or any of them, in connection with the securing of this insurance.

III.

Replying to Paragraph III, plaintiffs deny each and every allegation therein contained, except as may be admitted and qualified by the allegations of the complaint.

IV.

Replying to Paragraph IV, plaintiffs admit that on the 1st day of August, 1935, they purchased under conditional contract of sale from the Mitchell Sales Corporation of Bremerton, Washington, one (1) Lange Range, one (1) Norge Refrigerator, and one (1) wood and coal circulator, which property they received in their possession and was placed upon the premises covered by the insurance policy sued on herein. Relative thereto, however, these plaintiffs allege that defendants made no inquiry whatsoever concerning the title to said property. That these plaintiffs made no representations and filed no application therefor, and allege that the warranty relative to the sole and unconditional ownership set forth in said policy was not material to the risk, and relative thereto plaintiffs further state that they paid in full for all of said property and became the unconditional owners thereof on the first day of August, 1936, and were the unconditional owners thereof upon the date of said fire.

V.

Replying to Paragraph V, plaintiffs deny each and every allegation therein contained.

VI.

Replying to Paragraph VII, plaintiffs admit the tender of $83.25, as therein alleged.

Further replying thereto and specially replying to the third affirmative defense of the Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, plaintiffs admit, deny, and allege as follows:

[45]

I.

Plaintiffs admit Paragraph I thereof.

II.

Replying to Paragraph II, plaintiffs admit the same excepting that the plaintiffs deny that part thereof commencing with the word "which" at the end of the third line from the end of said paragraph to the end thereof.

III.

Replying to Paragraph III, plaintiffs admit the same, excepting that they deny that any of the acts or things done were without the knowledge of the defendants or their agent, but allege that they were within their knowledge at all times, and that the entire purposes for which said building was to be used were well known to the defendants, and all of them, at all times on and since the date of the policy of insurance sued on herein. Plaintiffs further deny that anything done upon said premises materially increased the risk for insurance purposes, as in said paragraph alleged.

Replying to the fourth affirmative defense, these plaintiffs state:

I.

Replying to Paragraph I, plaintiffs deny the same, excepting as may be qualified and admitted by the allegations of the complaint herein.

II.

Replying to Paragraph II, plaintiffs deny the same.

III.

Replying to Paragraph III, plaintiffs deny each and every allegation therein contained, except as may be admitted and qualified by the affirmative matter of this reply.

Wherefore, having fully replied herein, plaintiffs pray judgment as in the complaint.

RAY R. GREENWOOD
Attorney for Plaintiffs.

State of Washington,
County of Kitsap—ss.

John Myhre, being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Amended Reply, knows the contents thereof, and believes the same to be true.

JOHN MYHRE [46]

Subscribed and sworn to before me this 26th day of January, 1938.

RAY R. GREENWOOD

Notary Public in and for the State of Wash., residing at Bremerton.

[Endorsed]: Filed Jan. 27, 1938.

[47]

[Title of District Court and Cause.]

TRIAL RECORD, SHOWING IMPANELMENT OF JURY

Now on this 27th day of January, 1938, Ray R. Greenwood and H. Sylvester Garvin appearing for the plaintiffs, Guy B. Groff and Mervyn F. Bell, appearing for the defendant Fidelity and Guaranty Fire Corporation of Baltimore, Md. the defendant F. E. Langer is not in court, not having been removed from the State Court, this cause is called for trial, all parties announcing they are ready. The plaintiff files amended reply, and also files trial brief. Defendant files trial brief. A trial jury is impanelled and sworn as follows: W. B. Kimball, John W. Hageman, Chas. W. Harbaugh, Jacob A. Rasmussen, Roy W. Millikan, Julia E. Dolan, H. C. Comeau, Ora E. Pierce, Samuel Graham, Henry C. Ristine, C. C. Richesen and Wilbur F. Henry. During selection of the jury sworn, the following jurors were excused either through peremptory challenge or otherwise: Albert W. Tenney, W. E. Haack,

W. P. Cameron, C. B. Irish. At 10:55 A.M., the jury is admonished and a ten minute recess is declared and taken, pursuant to which the trial is again resumed with all jurors and parties with their counsel present. Opening statement is made by the plaintiffs, and reserved by the defendant. Plaintiff's witness John Myhre is sworn and examined. Plaintiff's exhibits numbered 1, 2, 3 and 4 are admitted in evidence. At 11:50 o'clock A. M., on request of the defendant the jury is excused until two o'clock, P. M., today to give opportunity of making argument on motions to strike certain testimony. Motion is denied. Exception is allowed. The trial at 12:17 o'clock, P. M., is thereupon recessed to two o'clock, P. M. at which time it is again resumed, roll call of the jury being waived, jury all present, and parties and counsel present. Witness Myhre resumes the witness stand for cross-examination. Plaintiff tenders requested instructions in duplicate, the original being given the Court, the duplicate being filed. Plaintiff's witness Bessie Bilquist is sworn and examined. At 3:20 P. M., a ten minute recess [48] is declared and taken pursuant to which the trial is again resumed, all jurors and parties and counsel being present. Witness Bessie Bilquist resumes the witness stand. Plaintiff's witnesses William Bilquest, Ervin Moen, Fred Vetters, Alan Totten, Olaf Nelson and F. E. Langer are sworn and examined. Plaintiff's exhibits numbered 5 and 7 are admitted in evidence.

Exhibit numbered 6 is not offered. Withdrawn. At 4:30 P.M., the trial is continued until 10 A.M., tomorrow.

Journal No. 25, page 424. [49]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find for the Plaintiffs, and fix the amount of their recovery in the sum of Four Thousand no/100 Dollars ($4000.00).

H. C. RISTINE
Foreman

[Endorsed]: Filed Feb. 1, 1938. [50]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NON OBSTANTE VERDICTO

Comes now the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, by Davis and Groff, its attorneys, and moves the Court to enter a judgment for the defendant, Fidelity and Guaranty Fire Corporation, notwithstanding the verdict of the jury heretofore empanelled and sworn and by it returned into Court in this cause, for the following reasons, to-wit:

1. Because it appears, by the undisputed and uncontradicted evidence in the case, that it was covenanted and agreed in the policy of insurance upon which recovery was sought, and one of the conditions thereof, that the entire policy should be void, unless otherwise provided by agreement endorsed on the policy or added thereto, if the hazard be increased by any means within the control or knowledge of the insured; that no agreement otherwise providing was endorsed on said policy or added thereto; that subsequent to the issuing of the policy the hazard of the insurance was increased by the use of the insured premises as a place for the public vending and sale of wines and beer and as a place of public dancing for compensation; that the use constituting such increased hazard was within the knowledge and control of the [51] insured, and that no request was made by the insured of the defendant or of its agent for modification of the policy to permit the use resulting in the increased hazard; that such use was unknown to the defendant or to its agent; and that by reason of such uncontroverted evidence, the defendant was entitled to a judgment in its favor as a matter of law, and no issue of fact existed proper to be submitted to the jury.

2. Because it appears, by the undisputed and uncontradicted evidence in the case, that it was covenanted and agreed in the policy of insurance upon which recovery was sought, and one of the conditions thereof, that the entire policy should be void, unless otherwise provided by agreement en-

dorsed on the policy or added thereto, if the hazard be increased by any means within the knowledge or control of the insured; that no agreement otherwise providing was endorsed on said policy or added thereto; that subsequent to the issuing of the policy the hazard of the insurance was increased by the use of the insured premises as a garage and as a place for the keeping and storing of automobiles, and by keeping and storing automobiles underneath the insured building; that the use constituting such increased hazard was within the knowledge and control of the insured, and that no request was made by the insured of the defendant or of its agent for modification of the policy to permit the use resulting in the increased hazard; that such use was unknown to the defendant or to its agent; and that by reason of such uncontroverted evidence, the defendant was entitled to a judgment in its favor as a matter of law, and no issue of fact existed proper to be submitted to the jury.

3. Because the Court improperly, and over the defendant's objection, admitted oral evidence of the knowledge of the defendant's agent that the insured building was used and occupied as an inn or hotel at the time of the writing of the policy of insurance [52] on which recovery is sought, as tending to modify or alter the contract arising out of such policy of insurance, in violation of the terms and conditions of the policy upon which the same was accepted, in the words and figures following:

> "This Policy is made and accepted subject to the foregoing stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions of conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

and submitted to the jury the question of whether or not the plaintiff was entitled to recover because of such knowledge of such agent; that under such policy of insurance, the knowledge of the agent was not sufficient to justify the reformation of the contract created by the policy of insurance, so as to permit recovery for loss by fire while the insured building was occupied as an inn or hotel; and that no issue of fact existed material to the alleged right of the plaintiff to recover necessary or proper to be submitted to the jury.

In presenting this motion for a judgment in its favor, notwithstanding the verdict of the jury, the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, does not in any manner waive or relinquish its right to present, urge and argue its alternative motion that the Court grant it a new trial of this cause in the event that this motion for judgment in its favor, notwithstanding the verdict, be denied.

FIDELITY AND GUARANTY FIRE CORPORATION
of Baltimore, Maryland
By DAVIS & GROFF
Its Attorneys [53]

Service of copy of within Motion hereby acknowledged this 5 day of Feb., 1938.

RAY R. GREENWOOD
Attorney for Plaintiffs

[Endorsed]: Filed Feb. 7, 1938. [54]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

At a session of the Honorable District Court of the United States for the Western District of Washington, of the Northern Division thereof, held at the City of Seattle in said district on the 21st day of February, 1938, the Hon. John C. Bowen, Judge of said Court, presiding, this cause came on further to be heard upon the motion of the defendant, Fidelity and Guaranty Fire Corporation, for a judgment in its favor notwithstanding the verdict of the jury, and, in the alternative, for a new trial; and the plaintiffs appearing by Ray R. Greenwood, their attorney, and the defendant appearing by Davis and Groff, its attorneys; and the Court having heard oral argument by counsel and having read and examined the briefs filed by counsel, and having fully considered the defendant's motion for a judgment for and in favor of said defendant notwithstanding the verdict of the jury, it is by the Court ordered, adjudged and decreed that the defendant's said motion for a judgment notwithstanding the verdict of the jury be and the same is hereby denied.

That thereupon the defendant asked for and was granted an exception to the order denying its said motion, such exception being based upon the following grounds:

1. Because at the time of the loss for which the plaintiffs seek recovery under the policy sued upon, the insured real property was not being used only for [55] dwelling house purposes, nor was the insured personal property located in a dwelling house building.

2. Because it appears by the uncontradicted evidence that subsequent to the issuing of the policy of insurance upon which the plaintiffs sue, the hazard of the insurance was increased with the consent and under the control of the insured through the use of the insured premises as a place for the sale of beers and wine to the public and as a place of public dancing, and that by reason thereof the policy became void.

3. Because it appears that at the time of the issuing of the policy of insurance on which plaintiffs sue, and at the time of the loss, the interest of the insured William E. Bilquist in the insured property was other than that of sole and unconditional ownership, and that by reason thereof the policy was void.

Thereupon the defendant asked leave to withdraw its alternative motion for a new trial, without prejudice to its right to file a new motion for a new trial within the time allowed by the Acts of Congress and the rules of Court for filing motions for new trials.

Upon consideration, the said motion is by the court granted and the defendant has leave to withdraw its said motion for a new trial, without preju-

dice to its right to file a new motion for a new trial at any time within the period allowed by the statutes and rules of Court for filing motions for new trials.

Done in open court at the City of Seattle in said district this 28th day of February, 1938.

JOHN C. BOWEN
Judge

Correct as to form:

RAY R. GREENWOOD
Attorney for Plaintiffs

DAVIS and GROFF
Attorneys for Defendant

[Endorsed]: Filed Feb. 28, 1938. [56]

[Title of District Court and Cause.]

WITHDRAWAL OF MOTION FOR NEW TRIAL

Comes now the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, and by leave of Court first had and obtained, herewith withdraws its motion in the alternative, heretofore filed, and now on file, for an order granting a new trial of the above entitled cause.

FIDELITY AND GUARANTY FIRE CORPORATION
of Baltimore, Defendant
By DAVIS & GROFF
Its attorneys

[Endorsed]: Filed Apr. 11, 1938. [57]

In the District Court of the United States for the Western District of Washington, Northern Division

No. 21098

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Plaintiffs,

vs.

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, Maryland, a corporation engaged in the business of writing fire insurance in the State of Washington,

Defendant.

JUDGMENT

Be it remembered that the above cause came on regularly for trial on the 27th day of January, 1938, before a jury, the plaintiffs being then and there present in court and by their attorneys, Ray R. Greenwood, Esquire, and H. Sylvester Garvin, Esquire, and the defendants being represented in court by its attorneys, Davis and Groff, and all parties having announced ready for trial, and the jury having been empanelled and sworn to try the case, and the evidence having been received, and said cause continued through the 28th of January, and having been then continued to and concluded on Tuesday, the 1st day of February, 1938, and the cause having been submitted to the jury, and the verdict having been rendered therein in favor of the plaintiffs and

against the defendants in the sum of four thousand dollars ($4000.00); and it appearing that the plaintiffs' action was based upon a policy of fire insurance insuring the plaintiff William E. Bilquist in part against loss or damage by fire of a certain building to an amount not exceeding twenty-five hundred dollars, and the loss, if any, was by said policy made payable to the Kitsap County Bank of Port Orchard, Washington, as its interest may appear;

Now, therefore, upon motion of the attorneys for the plaintiffs for judgment in accordance with the verdict, it is hereby [58]

Ordered and adjudged that the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, have and recover of the defendant, Fidelity and Guaranty Fire Corporation, the sum of twenty-five hundred dollars ($2500.00), together with interest thereon at the rate of six per cent per annum from the first day of February, 1937, until paid and satisfied, and that the amount of said judgment be payable to the Kitsap County Bank of Port Orchard, Washington, in trust for itself and the plaintiffs as their interests may appear.

And it is further ordered, adjudged and decreed that the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, do have and recover of the defendant, Fidelity and Guaranty Fire Corporation, the further sum of fifteen hundred dollars ($1500.00), with interest thereon from the first day of February, 1937, until paid and satisfied, together

with their costs of the action taxed and allowed by the court at ninety-two and 20/100 dollars ($92.20).

The defendant asks and is allowed the following exceptions:

First. To the judgments as entered.

Second. To the inclusion in the judgment entered of interest, upon the ground that the plaintiffs are not entitled to recover interest prior to the entry of judgment, not having asked for interest in their complaint and none having been allowed by the verdict of the jury.

Done in open court at Seattle, Washington, this 28th day of February, 1938.

JOHN C. BOWEN
Judge

Presented by:
H. SYLVESTER GARVIN
Approved as to form:
RAY R. GREENWOOD
H. SYLVESTER GARVIN
Attorneys for Plaintiffs
DAVIS & GROFF
Attorneys for Defendant

[Endorsed]: Filed Feb. 28, 1938. [59]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that in the trial of this cause in and before the United States District Court of

and for the Western District of Washington, the Honorable John C. Bowen, Judge of said court presiding, begun on the 27th day of January, 1938, and continued through the 28th day of January, 1938, and thence continued and completed on the first day of February, 1938, and the defendant being represented by Mr. Guy B. Groff of Davis and Groff, its attorneys and counsel, and the plaintiffs being represented by Mr. Ray R. Greenwood and Mr. H. Sylvester Garvin, their attorneys and counsel, and a jury being duly empanelled and sworn, the following proceedings were had and testimony taken:

JOHN MYHRE,

a plaintiff, called and sworn as a witness for plaintiffs, upon

Direct Examination

testified as follows:

My name is John Myhre. I am one of the plaintiffs and reside at Port Orchard, where I have a restaurant and an interest in a beer parlor. I knew the Bilquists in North Dakota in 1923. They came to this country in 1935.

We bought the Manchester Inn in partnership from Mr. Haas, a real estate man in Port Orchard. There were four lots [60] the same as described in the policy, and we paid $3500.00. It was an inn of 11 rooms upstairs, four rooms and a lobby downstairs, a wooden frame building on a pile foundation and not in very good condition. We replaced

(Testimony of John Myhre.)

piling, built porch over, painted and redecorated inside and replaced furniture, sanded and varnished the floors. The total cost was between six and seven hundred dollars. When we bought we secured a loan of $1500.00 from the Kitsap County Bank, and Langer said he wanted to write the insurance and I told him he could. He came to my restaurant and asked me how much insurance to write. We agreed on $2500.00 on the building and $1500.00 on the furniture. I did not tell him how to write it. When we bought, there was a mortgage for one thousand dollars on the property to Haas; assigned to Jones, and one year later acquired by the bank. Mr. and Mrs. Bilquist and I had signed a mortgage and filed it with him. Later, at the bank, Langer showed me the policy folded up and said, I have got your policy. I looked at the name William Bilquist on it and said, If I am going to pay for that I want my name on it; I am half owner in that place. Langer said, We will have it changed then. I did not see the inside. I never inquired whether it had been changed. Shown plaintiff's Exhibit 1, he stated that it was the policy folded as he exhibited it to me. The witness having been shown plaintiff's Exhibit 2, said that it was for $77.00 drawn on his account for insurance. I did not see the policy afterwards. Langer kept it in the bank. When we purchased the property we intended to use it as an inn, of which we advised Langer, and immediately began fitting it up as an inn; it has no use for any

(Testimony of John Myhre.)

other purpose. Mr. and Mrs. Bilquist lived there practically all the time. We bought a refrigerator, a range and a heat circulator from the Mitchell Sales Co. on a conditional sales contract, which was paid in full before August 1, 1936.

Plaintiff's Exhibit No. 1 offered on behalf of the plaintiff and admitted. [61]

PLAINTIFFS' EXHIBIT No. 1

consisted of the defendant's policy of insurance No. 28222 with the Standard Forms Bureau form No. 548 attached thereto, and made a part thereof, and the riders and clauses thereto attached and made a part thereof, issued to William E. Bilquist on August 10, 1935, so far as such riders and clauses are material to or affect any question arising in this action, or upon this appeal, is in the words and figures following:

Standard Fire Insurance Policy

No. 28222 Stock Company

Fidelity and Guaranty
Fire Corporation
Baltimore

Amount $4000. Rate 1.925 Premium $77.00

In Consideration of the Stipulations herein named and of Seventy seven and no/100 Dollars Premium, does insure William E. Bilquist for the term of Three years from the 10 day of August 1935, at noon (Standard Time) to the

(Testimony of John Myhre.)

10 day of August 1938, at noon, (Standard Time) against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Four thousand and no/100 Dollars, to the following described property while located and contained as described herein and not elsewhere, to wit:

Standard Forms Bureau Form 548 (Oct. 1931)

Unprotected Dwellings (Including Seasonal Dwellings and Summer Cottages) and Private Stables, Outbuildings and Private Garages in Connection Therewith.

On the following described property, all only while situate Lots 1 and 2 of block 4, also lots 8 and 9, block 5, Davis Addition to Manchester, Washington.

*1. $2500.00 On the two story, shingle roof, frame building and additions in contact therewith while occupied only for dwelling house purposes. All permanent fixtures, including attached fittings, for supplying and/or utilizing water, steam, gas, electricity and/or air for heating, lighting and/or ventilating said building to be construed as a part of it only while installed therein or thereon. Awnings, storm and screen doors and windows for said building to be covered by this insurance while

(Testimony of John Myhre.)

attached to or stored therein and/or while stored in other buildings situate on the same premises.

*2. $1500.00 On household furnishings and personal effects, including casts, curiosities, sculptures, jewels, medals, pictures, scientific apparatus, drawings, dies, implements, tools, food and fuel [62] owned by insured and/or members of his family; all only while contained in the above described dwelling house building. Awnings, storm and screen doors and windows (if the property of the tenant and not otherwise insured) to be covered by this insurance while attached to or stored in the above described dwelling house building and/or while stored in other buildings situate on the same premises.

Warranties

The following are Statements of Facts known to and warranted by the insured to be true, and this Policy is issued by the Company Relying on the truth thereof; if any of such statements of fact is untrue, this Policy shall be void:

Title: The title to the insured property is in name of William E. Bilquist

(Testimony of John Myhre.)

Encumbrance: No encumbrance on land except $2500.00. No encumbrance on personal property except $..... Encumbrance is not past due except No except
Property is not in litigation or dispute except No except

Other Insurance: There is no other insurance on this identical property except as follows:

Item 1: $ None Item 2: $ None
The insured has never had a loss by fire except No except The insured has never had policies cancelled except by the following companies: No except

(Testimony of John Myhre.)

Rate Information	Dwelling House Credits	Charges	Basis
Are electric lights used throughout? In Dwelling Yes	$10		
Is roof entirely covered with metal, tile, slate or composition roofing material? Dwelling No			
Are foundations of stone, brick or concrete and continuous under all walls (not pier construction)? Dwelling No			
Has exterior frame construction been thoroughly paint within the last 5 years? Dwelling No; or are all exterior walls stuccoed or brick-veneered? Dwelling No			
Are all chimneys of Dwelling of brick, natural stone or rock? Yes	$15		
Are all rooms of Dwelling plastered on lath or sheathed with plaster or wall board throughout? Yes	$15		
Occupancy: Is Dwelling occupied by owner? Yes			
Is Owner's Occupancy Warranty to be attached to this policy? Yes	$15 Total Cr. = $55		
Are there any artificial stone, earthenware, tile, terra cotta, cement, gypsum block or filled chimneys? In Dwelling No			
			[63]
Are there any stovepipes or metal stacks? In Dwelling No			
Has Dwelling canvas sides and/or roof? No			

det

Note: If building is exposed, furnish information called for on back of this form.

(Testimony of John Myhre.)

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 28222 of the Fidelity and Guaranty Fire Corporation

Agency at Port Orchard, Washington, Dated August 10, 1935.

F. E. LANGER

Agent

For other provisions see reverse side of this rider

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor

(Testimony of John Myhre.)

shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Port Orchard.

FRANK A. GANTERT
President
J. TABB ROBERTSON
Secretary

Countersigned at said Agency this 10 day of August 19.....

F. E. LANGER
Agent

Printed upon the back of the policy and therein referred to in and made a part of the policy were certain conditions and stipulations upon which the policy was made and accepted, relevant and material to the questions and issues arising upon the trial of this cause and upon this appeal, and which were as follows: [64]

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according

(Testimony of John Myhre.)

to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the

(Testimony of John Myhre.)

property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed;

(Testimony of John Myhre.)

or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, [65] naphtha, nitro-glycerine or other explosives, phosphorous, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, in-

(Testimony of John Myhre.)

surrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, *patters,* pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes,

(Testimony of John Myhre.)

and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation

(Testimony of John Myhre.)

having an interest in the subject of [66] insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best

(Testimony of John Myhre.)

possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

(Testimony of John Myhre.)

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select [67] a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or

(Testimony of John Myhre.)

proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance whether valid or not, or by solvent or insolvent insurance, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or conditions written hereon or attached hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

(Testimony of John Myhre.)

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage". If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Upon the back of the rider, form 548, attached to the policy and made a part of the rider and of the policy, were printed the following provisions and clauses:

Restriction in Case of Specific Insurance.

No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein.

(Testimony of John Myhre.)

Guests and Servants Clause.

Not exceeding ten (10%) per [68] cent of the amount of any item of this policy on personal effects shall cover also, as per above form, property of guests (not including guests for compensation) and servants, loss if any, to be adjusted with and payable to the insured named in this policy, but in no event shall the aggregate claim for loss under any item of this policy exceed the amount of insurance specified and inserted in the blank immediately preceding the item.

Permits.

Permission granted for the within described premises to be and remain vacant for a period not exceeding 10 days at any one time, the term "vacant" being construed to mean an empty building devoid of personal habitation; or to be and remain unoccupied for a period not exceeding 30 days at any one time, the term "unoccupied" being construed to mean a building that is entirely furnished, but with personal habitants temporarily absent. It is understood that a building not intended for human occupancy shall be deemed to be unoccupied or vacant (as the case may be) if the dwelling house appurtenant to such building be unoccupied or vacant (as the case may be) as herein defined. If the premises are vacant for a period exceed-

(Testimony of John Myhre.)

ing 10 days, or unoccupied for a period exceeding 30 days, at any one time, this policy is void unless a special form of permission is attached hereto.

Permission granted for such use of the premises as is usual and incidental to the occupancy as described herein, and to keep and use articles and materials usual and incidental to such occupancy in such quantities as the exigencies of the occupancy require.

Permission granted to make alterations, improvements and repairs to any building herein described, and to complete same if under construction, and the insurance, if any, hereunder, on such building is hereby extended and made to cover such alterations, improvements and repairs, and the building materials and supplies therefor or entering into the construction of such building, while contained therein or on the premises immediately adjacent thereto.

Incubator and/or Brooder Prohibition Warranty.

Warranted by the insured that incubators and/or brooders will not be operated during the life of this policy in any of the within described buildings (including incubator and/or brooder houses) unless a specific permit therefor is made a part of this policy. A breach of this warranty suspends, during such breach, the in-

(Testimony of John Myhre.)

surance hereunder on buildings (and/or on their contents) in which such breach occurs.

Consequential Damage Exemption Incubator and/or Brooder Clause.

It is understood and agreed that the insurance (if any) under this policy on Eggs and/or Chicks in incubators and/or brooders, does not extend in its application to cover, and this Company shall not be liable for any indirect or consequential loss or damage thereto, including loss or damage caused by change of temperature resulting from, occasioned or caused by the total or partial destruction by fire of the heating or warming apparatus, connections or supply pipes, nor by the interruption of the heating or warming process from any cause.

Lightning Clause.

This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term lightning and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however, that if there shall be any [69] other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether

(Testimony of John Myhre.)

such other insurance be against direct loss by lightning or not.

Electrical Exemption Clause.

If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural, including lightning.

There was attached to and made a part of said policy of insurance Standard Forms Bureau Form 391, called an owner's occupancy warranty, which was and is in the words and figures following:

Standard Forms Bureau Form 391 (May 1929)
Owner's Occupancy Warranty
(Farm Dwellings and Contents)
Commencement of Policy
8-10-35
Expiration of Policy
8-10-38

Subject to the conditions of this policy regarding vacancy and/or non-occupancy, it is warranted by the insured that the dwelling(s) described under Item(s) No.(s) first will at

(Testimony of John Myhre.)

all times be occupied by the unconditional and sole owner of the within described land, or by immediate members of said owner's family or by a salaried employee of said owner. A breach of this warranty suspends this insurance during such breach. It is understood that if with the written consent of this Company said owner has entered into a contract of sale of the within described property, the provisions of this warranty shall be extended to include such contract purchaser, or such contract purchaser's immediate family or salaried employee.

Attached to Policy No. 28222 of the Fidelity and Guaranty Fire Corporation.
Issued to William E. Bilquist
Agency at Port Orchard, Washington.
Dated August 10, 1935.

F. E. LANGER
Agent

There was attached to said policy and made a part thereof Standard Forms Bureau Form 371, commonly called a mortgage clause with full contribution, dated August 10, 1935, providing that subject to the terms, covenants and conditions therein set forth, loss or damage, if any, under such policy, on buildings only, should be payable as follows: [70]

Firstly, to Kitsap County Bank, first mortgagee, as interest may appear, whose mail address is Port Orchard, Washington.

(Testimony of John Myhre.)

> Secondly, if any balance remains, to Clarence Jones, as second mortgagee, as interest may appear, whose mail address is Manchester, Washington.

There was attached to said policy, and made a part thereof, Standard Forms Bureau Form 371, commonly called a mortgage clause with full contribution and described and marked thereon as amended form, dated November 29, 1935, providing that subject to its terms, covenants and conditions therein set forth, loss or damage, if any, under such policy, on buildings only, should be payable as follows:

> Firstly and secondly as in the first original clause aforesaid provided, and: thirdly, if any balance then remain, to John and Signe Myhre as third mortgagees as their interest may appear.

Both of said mortgage clauses were subject to identical covenants and conditions set forth on the reverse side of the rider and made a part thereof, relating to the rights and duties of mortgages concerning the payment of premiums, notification of the company in case of foreclosure, or increased hazard; cancellation of the policy, rendering proof of loss, appraisal, other insurance, subrogation of the company to rights of mortgagee upon payment of loss.

(Testimony of John Myhre.)

The mortgagees, not being party to this action, none of such covenants and conditions are in any way applicable to any issue or question arising upon the trial of this cause, nor upon this appeal.

Plaintiffs' Exhibit No. 2, offered on behalf of the plaintiffs, was admitted.

PLAINTIFFS' EXHIBIT 2

consisted of a written draft, without date, for the sum of seventy-seven dollars drawn on John Myhre of Port Orchard by the Kitsap County Bank of Port Orchard, bearing [71] on its face the words "Bilquist Fire Ins." and "On this date you were advised that your account in this bank was charged the amount of the unpaid items described hereon."

Plaintiffs' Exhibit No. 3, offered on behalf of the plaintiffs, was admitted.

PLAINTIFFS' EXHIBIT 3

was the conditional sales contract with the Mitchell Sales Corporation under which the plaintiffs purchased certain furniture and equipment placed in the insured building and destroyed by the fire. It appeared on the trial that the amount due under such conditional sales contract had been fully paid prior to the date of the loss and the defendant waived any defense arising out of the ownership of such property under such conditional sales contract, and the terms of such exhibit thereby became and were and are immaterial, and not relevant, to

(Testimony of John Myhre.)

any of the issues or questions involved in the trial of the cause or upon this appeal.

At this point the defendant interposed an objection to the testimony given by the witness as to what was said by Langer and what was not said by Langer and as to what was said by Myhre and by Bilquist, as inadmissible for any purpose except that of varying the terms of the written contract of insurance by parole evidence; and moved to strike the same. The court overruled the objection, and reserved consideration of the motion to strike.

Thereupon it was openly stated and agreed by counsel that the testimony should go in subject to the defendant's objection.

"The building and furniture were totally destroyed by fire on the 12th day of September, 1936. I learned of it on the morning of that day. I went down and stayed until Langer came. He said he would call them right away. I did not see any adjuster until the 60 days had gone by. I had conversations with Langer from time to time. All I could get from him was that he expected a [72] check at any time. He said something to the effect that he would take care of it, and I relied on that.

Langer and I went to McCollister & Campbell's office in Seattle and found out that they were not going to pay the policy. They told me they would not pay because it was made out as a dwelling house instead of an inn; that I was supposed to be half owner and was in as a mortgagee. That is the first

(Testimony of John Myhre.)

I knew that the policy was not going to be paid. I think this was more than sixty days after the fire. I then employed Mr. Greenwood and instituted this suit.

After we bought, Moen got a license to operate a beer and wine concession in the place. It was carried on in a corner of the building in a room about 12 x 14, but wines and beer were served in the dining room. We put in beer taps, coil boxes, glasses, 6 chairs, and a small back bar with a mirror. There was no stove or electrical apparatus and no oil or combustibles kept there in connection with that business.

Plaintiffs' Exhibit 4 is a form for our loss of the furniture and equipment destroyed by fire. The loss totals $1,871.00, figured at second-hand prices.

Plaintiffs' Exhibit No. 4 offered on behalf of the plaintiffs and admitted.

PLAINTIFFS' EXHIBIT 4

is a list of hotel upstairs, bath room, rest room, kitchen, lobby, dining room and bar room furniture and equipment destroyed by the fire, with the values placed thereon by the plaintiffs, aggregating the sum of $1,871.00, and filed by the plaintiffs as their proof of loss. [73]

When we took the insurance we signed no application before Langer.

At the close of the direct testimony of the witness John Myhre, the defendant renewed its motion

(Testimony of John Myhre.)

to strike the evidence of John Myhre as being an attempt to vary the terms of the policy by parole evidence, and as an attempt to show a waiver of the terms, stipulations and conditions of the policy of insurance contrary to the provisions of the policy that its terms and stipulations and conditions could be waived only by agreement endorsed upon or added to the policy.

The motion was denied by the court without prejudice to the right of the defendant to renew it at other stages of the trial.

The defendant seasonably asked and was allowed an exception.

Upon

Cross Examination

the witness John Myhre further testified as follows:

I have lived in Port Orchard and been in the restaurant business since the first part of 1931. I started handling beer in 1932 or 1933. The destroyed property and my place of business in Port Orchard are in the same county, about 6 miles apart. I knew Bilquist in North Dakota. He was from the town of Hanks. When I knew him he was a farmer; later he bought and ran a hotel. Not long after he came to Port Orchard we began to negotiate for the purchase of the property. This particular property was owned by a man named Haas, a real estate operator near my place of business. Mrs. Bilquist spoke to Haas about the place and then spoke to me about it. They told me it was at Manchester. I

(Testimony of John Myhre.)

had not paid any particular attention to the place before.

Mr. and Mrs. Bilquist and my wife and I looked at it. A Mrs. Gunther was living there. We asked her about the place [74] and what it had been used for and how it had been conducted. We looked at the furniture, which was in very poor condition. Not very long after we began negotiations with Haas for the purchase of the property. The four of us agreed with Haas on the terms, and bought the place together. We were to pay so much down and so much a month. We borrowed $1500.00 from Langer in the first place. Our purchase price was $3500.00. We paid down $1000.00 in cash. Mr. Jones had a mortgage on the property for $1000.00. We gave Langer a mortgage for $1500.00. I had been a customer of Langer's bank since 1931. I arranged the credit with him, giving a note signed by myself and wife and Bilquist and wife, with a mortgage on the property. This was recorded just after the deed from Haas to us. Langer attended to it. Mrs. Applegate represented us in the transaction. I have borrowed money before, but I think this is the first time I ever gave a mortgage. I don't think I read the mortgage—I left that all to Langer. I imagine that it was Langer who had me and my wife sign the mortgage. The mortgage was delivered to him. He had the deed and the mortgage. We signed the note and mortgage in his bank. I expected him to keep the policy, and he did. I was in his bank nearly

(Testimony of John Myhre.)

every day. I did not ask him to let me see the policy, but he showed it to me voluntarily. I kept an account with him. I gave no permission to charge the premium to my account. He said nothing about it. He gave me a slip which said it was in payment of the insurance. I first learned that my interest appeared as third mortgagee when Langer and I went to see the insurance company in Seattle after the fire. We bought the property because we thought it was a good investment and a good place for the Bilquists to make a living.

When the deal was consummated Mr. and Mrs. Bilquist went down and took possession. I helped them out, but they practically [75] helped themselves after they got there. They started business immediately. I went down occasionally to see how they were getting along, and they came up occasionally to tell me how they were getting along. We bought some furnishings for the house on the installment plan; they were put into the house and paid for out of the proceeds of the business. Langer wrote two notes, one for $1500.00 and one for $2100.00 or $2250.00, which the four of us signed. I made the arrangment for the credit. We went in and executed the mortgages. He took our acknowledgment. After Bilquist started they started to sell meals and lodgings. Moen got a license for himself to operate a beer saloon on the premises. It was operated from the time he secured the license in

(Testimony of John Myhre.)

April 1936 up to the time of the fire on September 12, 1936. I knew they were selling beer. They paid a fiddler or a man that played the piano and they had dancing there every night. They closed up in the winter of 1935-1936 and went out and went to work over the winter. They were in California. Mrs. Bilquist worked for me in Port Orchard that winter. They did not start fixing up until about two weeks before they got the license in April 1936. The piano player sat in the dining room where they danced. The only change made was to put in two toilets and a bar with room for six stools in front of it. We tried to close at one o'clock. There was an investigation by the State Liquor Board of the beer saloons or beer parlors in Manchester. The Board sat two days. I was there as a spectator. The Board refused to renew any license to sell beer in Manchester. Mr. Greenwood got the policy from Langer about a year ago at the time when he started suit. I told Langer I wanted the names changed so that my name was on the policy. I took it for granted he had changed it. Bilquist was not the sole owner. We put in $600.00 in improvements. Plaintiffs' Exhibit 1 is the policy I am attempting to collect on and the one I refused to pay Langer for. I told him I wanted it changed so my name was on the policy.

(Testimony of John Myhre.)

Upon

Redirect Examination

the witness John Myhre further [76] testified as follows:

When I told Langer I wanted the policy corrected he said, "We will have it changed." This was after he had taken the money out of the bank for the premium. I assumed and relied upon the fact that he had changed it. We put about $800.00 in new furniture.

Upon

Recross Examination

the witness John Myhre further testified as follows:

Practically all the improvements were made before we put in the beer parlor. Less than $200.00 was spent to put in the ice boxes, bars, etc. The toilets cost about $50.00.

MRS. BESSIE BILQUIST,

called and sworn as a witness on behalf of the plaintiffs, upon

Direct Examination

testified as follows:

My name is Bessie Bilquist. I live at Retsil. I have known Mr. and Mrs. Myhre many years. We came to Washington in June 1935 and my husband

(Testimony of Mrs. Bessie Bilquist.)

and I and Mr. and Mrs. Myhre acquired the property known as Manchester Inn. We bought it together equally, including the furniture and equipment. The new equipment we purchased half and half. We paid $3500.00 and put in a lot of new furniture and renovated the whole house by papering, varnishing, fixing the furniture and rugs. We put in new pilings and a porch.

We were all four in the deal, but most of it was left to Myhre and myself. After we took possession of the inn we lived in it. We purchased it for a summer hotel and an inn. Langer came down and looked it over before he made the loan. We told him what we were buying it for. It was a large two story frame building shingled on the outside, fronting on the Bay, with 11 rooms upstairs and 6 downstairs. There is a large dining room, a kitchen and a lobby. At one time one room was used for a bedroom and we transferred it into a sitting room which later became a bar room. It was not over 12x14. When the beer and wine was taken on we [77] renovated it, cleaned it up and put in a little back bar, a counter and 6 stools.

Our main business was serving meals and our beds and over week-end guests. We served banquets. We served 85 Manchester citizens at one time, the Bremerton Teachers' Club with about seventy-five at another, and the ladies' organizations several times in the afternoon.

(Testimony of Mrs. Bessie Bilquist.)

There was no additional heating apparatus or wiring put in when the beer parlor was installed. There was a beer cooler. The place was conducted no differently after that than before. We had a piano before the beer, but did not have the piano player until after. I was there at the time of the fire. It occurred between three and four in the morning. My husband, myself, William Gilbert, the piano player, Lloyd Halsted, Ervin Moen and Jimmie Farrell were all in bed. I discovered the fire. We closed up before one and went to bed about one. I had been asleep and awoke. I heard a sound like rain which I later discovered was burning shingles. I lay there a while and then I was sure I smelled smoke. I got up and opened the hall door. The hall was filled with smoke. I awakened my husband, Gilbert, Joen and Jimmie Farrell. We got out through the back stairs, on the beer parlor side. There was no fire in the beer parlor. It was coming from the opposite side and up through the stairway. The flames were coming from the basement. We were not able to save a thing.

Mr. Myhre and I fixed the values on Plaintiffs' Exhibit 4 at second-hand values. I think that is what they were worth. I went with the adjuster and my husband the next day to look the ruins over. My husband and I left about ten days after for Eastern Washington to pick apples and left the matter in John Myhre's care. The building was a complete loss.

(Testimony of Mrs. Bessie Bilquist.)

Upon

Cross Examination

the witness Bessie Bilquist further [78] testified as follows:

We had conducted a hotel at Hanks, North Dakota, before coming here. When we came we lived at the residence of Mr. and Mrs. Myhre. We had an apartment there. When we reached an agreement with Haas it was agreed that Mr. Bilquist and I should operate the property. Myhre furnished the credit with Langer to make it possible. It was our purpose to make a living by conducting an inn where we would sell meals. We had not thought of selling beer and wine at that time. The place was closed from December 1935 until April 1936. During that time we made our plans to put in a bar and to serve beer and wine. We had Moen secure the license in his own name. Some of the furnishings for the beer parlor were purchased by Moen and my husband. Moen attended the bar and Gilbert played the piano. I was the waiter. I do not know what arrangement my husband had with Moen about the bar. He conducted the bar and the beer and kept track of all that was sold in the bar room. I could not remember how much he received for that. Myhre knew we were conducting a beer saloon. We were open from nine or ten in the morning until one o'clock at night. At times we had big crowds. We let them have a good time. Saturday nights we had crowds big enough to dance. Gilbert was there all

(Testimony of Mrs. Bessie Bilquist.)

the time, and when anybody wanted to dance he would play the piano. We wanted everyone to have a good time; I suppose we wanted a crowd. The fire was on Friday night. We were up until one o'clock. There was a large porch in front of the building that faced the Bay side, and a large space that came off the porch and opened onto the lobby. The stairs went up from the lobby and there was a fireplace in it. That was where people sat the night of the fire.

There was a basement under the whole house, but no furnace. The automobile was kept under the front porch on the Bay side. The building was all frame and the basement was high enough for a man [79] to walk under. We had an electric range there and stoves. From Eastern Washington we went to Lindsay, California. While there someone representing the insurance company called on us and asked us to make a written statement. I read it over when I signed it.

Our guests could amuse themselves by dancing and drinking beer and staying up until one o'clock in the morning. As many as wanted to could come in if the place could conveniently hold them. We usually had a very choice crowd. We invited a few out that were undesirable. Complaint was made by people in the community about being disturbed.

In our early married life my husband and I lived on a farm. We sold the farm and went to Hanks and started in the hotel business. I have been deal-

(Testimony of Mrs. Bessie Bilquist.)

ing with the public for some time and naturally know what a fire insurance policy is. I did not ask Langer to see the policy. I made no effort to see the contents of it, and so far as I know my husband did not. Myhre and I were the only ones who negotiated and attended to this business transaction. If anything had been made we would naturally have divided it.

Myhre put up $250.00 of the purchase money on the property for our benefit under a verbal agreement we had with him. Myhre came down to the inn frequently. He told us he had taken out insurance. At the time of the fire my husband and I occupied rooms on the second floor. J. L. Farrell and William Gilbert, the piano player, and Lloyd Halsted resided with us. Halsted worked at the stone quarry and Irvin Moen was the bar-tender. The fire took place on the Bay side. The lobby and the dining room were all on the Bay side and the piano was in the dining room. People danced on the Bay side. The fire took place on the side where the dance hall and the lobby with the open fireplace was. We used the dining room for dancing. Any time people came in Gilbert played the piano. Sometimes they paid him for playing it. We wanted guests to have a [80] good time. We had the piano player for that purpose. We bought some property from North Dakota. It is still ours.

WILLIAM BILQUIST

one of the plaintiffs, called and sworn as a witness on behalf of the plaintiffs, upon

Direct Examination

testified as follows:

My name is William Bilquist. I am one of the plaintiffs and the husband of Bessie Bilquist. My wife and I operated this building. I made the arrangement with Moen as to the concession for beer and wine. We divided half of the profits of the beer place between the house and him. My wife took care of the dining room and upstairs. My wife and Myhre conducted the transaction for the purchase of the place. I did not take much personal part in it.

I was there when the fire occurred. The place with all the furniture was completely burned. When I got out of the building the flames were pretty well over the whole thing; the front part was all burned up, but the back part was not. The only thing I could say is that it started on the front or Bay side; that is all I know. I am positive that it started on the bottom in the basement, or on the first floor. The beer parlor was on the other corner and there was no fire on that side at the start. In the beer parlor there was only a frigidaire.

(Testimony of William Bilquist.)

Upon

Cross Examination

the witness William Bilquist further testified as follows:

We began serving beer on the premises about April 1, 1936, and were serving beer the night before the fire. We served beer to customers at tables in the dining room, but not on the porch. The fireplace was in the room between the dining room and the lobby and on the Bay side.

I never made any attempt to see the insurance policy. I knew there was a policy taken out because Myhre told me so. That is all I know about it. [81]

My wife made the deal for the $250.00 from Myhre that was used in the purchase of the property. I had an automobile there. Moen, the bar tender, had one. I left my car outside that night. Moen's car was burned up. He came in after I went to bed.

After we had done some decorating, we began to invite people to stay and to serve meals. We were running a summer hotel. We first conceived the idea of putting in a bar room in the spring of 1936. I told Myhre we were going to put it in, but did not tell Langer. Myhre told me he had insurance on the property, but he did not tell me who had written it. There were a few more people there when we had the saloon. We had as big parties before and fed eighty and ninety at one time. We never had that many that ate there at any one time after we

(Testimony of William Bilquist.)

put beer in. I did not make inquiries about the insurance to find out what the rate would be on a hotel, and made no inquiries about the insurance when we put in the beer parlor.

ERVIN MOEN

called and sworn as a witness for the plaintiff, upon

Direct Examination

testified as follows:

My name is Ervin Moen. I am the person who conducted the beer concession. Bilquist put in the fixtures when the bar was built. My arrangement with him was that we were each to take fifty per cent of the profit from the bar room. I was there the night of the fire. The fire originated somewhere in the front part of the building underneath the lower part. The beer parlor was on the northwest corner. The main business conducted in my estimation was meals and rooms. They lived there, too.

Upon

Cross Examination

the witness Ervin Moen further testified as follows:

I was the bar tender. There was enough business to keep me occupied as a bar tender. I left the premises the evening before the fire about seven o'clock in the evening and returned around [82] one-thirty. I had trouble getting the engine to my

(Testimony of Ervin Moen.)

car started and had to be pushed. I went to Port Orchard. When the fire started it went fast and it nearly got us before we could get out. It was an old building. I lived in Port Orchard. I had been in the state about three years. I had not known Bilquist before. I proposed to Bilquist the putting in of the bar. He had found out that he could not take out a license.

FRED VETTERS

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Fred Vetters. I am Chief Deputy Sheriff of Kitsap County, at Port Orchard. I had occasion to go into and observe the Manchester Inn. While beer and wine was served there, I thought it was a very clean-cut place as a beer parlor. I never had any kick on the place individually nor any trouble with rowdyism or drunkenness.

Upon

Cross Examination

the witness Fred Vetters further testified as follows:

I have been Chief Deputy for over two years and a half. I live at Port Orchard, west of the court house. Before I became a Sheriff I followed the business of prospecting in the Stikine River district

(Testimony of Fred Vetters.)

of Alaska. I inspected the inn on Saturday evenings and most of the time on Friday, because we patrol these districts wherever there are any beer parlors or places of amusement such as dance halls. There was no other dance hall there. There was a little beer parlor up on the hill that they tried to dance in and we told them to cut it out. There were three places there that dispensed wine and beer. We would drop in at different times from nine on up to one and stay a little while and leave. We had complaints about the beer parlors in Manchester. The Liquor Board wiped them all out.

Upon

Redirect Examination

the witness Fred Vetters further [83] testified as follows:

I did not have any complaint against this beer parlor.

ALLEN TOTTEN,

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Allen Totten. I am in the meat and grocery business at Port Orchard where I have lived about twenty years. I frequently went to the Manchester Inn while it was operated by Mr. and Mrs. Bilquist. I sold them stuff and I used to go

(Testimony of Allen Totten.)
down once in a while and have a glass of beer. Every time I was there it was very quiet.

Upon

Cross Examination

the witness Allen Totten further testified as follows:

My wife did not go along. I was there one Saturday night. I belong to the Fire Department and we entertained the Fire boys there. We were orderly. That is the only time I was ever there when there was a crowd.

OLAF NELSON,

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Olaf Nelson. I have lived in Manchester since 1925. I operate a general store there. I am acquainted with the Manchester Inn and frequently visited it while Mr. and Mrs. Bilquist were there; mostly on Saturday nights. I never saw any rowdyism. I never saw trash thrown around; there were plenty of ash trays.

Upon

Cross Examination

the witness Olaf Nelson further testified as follows:

My place is five or six hundred feet from the Man-

(Testimony of Olaf Nelson.)

chester Inn. I went there with friends to relax and dance and drink a little beer and have a little fun. It was rather crowded. Not many people went to the bar. They would bring the beer in pitchers. We could smoke if we wanted to, leave our pitchers and dance and [84] come back and smoke cigarettes and do anything we wanted to within reason to have a good time. From April to September I may have been there a dozen to twenty times. I had patrons along the beach in the summer time. The Manchester Inn was the last one granted a license. It went out after a hearing of two days.

FRANK E. LANGER,

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Frank E. Langer. I am president of the Kitsap County Bank at Port Orchard. I have been in the banking business all my life and with that bank since 1919.

Since I have been with that bank it has continuously loaned money on real estate. I have been one of its appraisers and I am familiar with the value of property around the south end of Kitsap County. On July 23d, 1935, Haas and I appraised the property known as Manchester Inn. He is a realtor

(Testimony of Frank E. Langer.)

and insurance man and a member of the Board of our bank. I am a licensed insurance agent. The insurance is handled separate from the bank and is my own agency. On August 10th, 1935, I was the agent of the Fidelity and Guaranty Fire Corporation for that district, and was furnished with blanks to transmit to that company in connection with fire insurance. I placed the policy and collected the premium for that company on the policy marked "Plaintiffs' Exhibit 1". I did not secure any written application from Myhre or any of the insured. I was furnished Standard Bureau Form No. 548, which is Plaintiffs' Exhibit No. 5. When I secure the right to write a policy I fill out this form and send it to the company at Seattle, and as a rule they write the policy and send it back and that form becomes a part of the policy. It is sent to Seattle to have the rate fixed, and when it comes back I sign it. That was what I did with this policy. It was sent to McCollister & Campbell in Seattle and I was the only person who signed it other than the facsimile [85] signature of the president and secretary of the company, the home officers of the company. I am the only one signing the policy in Washington. When Myhre and Bilquist first purchased the property, the first loan was $1500.00 for which we took a mortgage signed by Mr. and Mrs. Myhre and Mr. and Mrs. Bilquist. I had the abstract brought down and kept it in my possession. I knew they both had money invested

(Testimony of Frank E. Langer.)

in it. I told Myhre that in case we made the loan we would like to have the insurance. That is customary when making a loan. I made no inquiry of him as to who should be insured. I filled in the form and mailed it to the company in Seattle. They filled in the policy and mailed it back. The bank had the note and mortgage signed by both parties in its possession at that time. I think Mrs. Applegate made out the note and mortgage. I didn't. Myhre came in the bank and asked for the policy and I gave it to him. He said his name did not appear in the policy and that he wanted his name to appear in it. I told him that I would take care of it so his interest and right would be protected. I sent the policy back to the company. I think I instructed the company to put that mortgage clause mentioning Myhre on the policy. Plaintiffs' Exhibit 7 is the first mortgage note, signed by Bessie Bilquist, William Bilquist, John Myhre and Signe Myhre. Plaintiffs' Exhibit No. 5, offered on behalf of the plaintiffs and admitted. Plaintiffs' Exhibit 5 is Standard Forms Bureau Form No. 548, unsigned and with blanks unfilled, and except for want of signature and for want of any filing or entry in the blank spaces thereof, is identical with Standard Forms Bureau Form No. 548, attached to and a part of the policy, Plaintiffs' Exhibit 1. Plaintiffs' Exhibit No. 7, offered in behalf of the plaintiffs and admitted.

(Testimony of Frank E. Langer.)

PLAINTIFFS' EXHIBIT 7

is a promissory note bearing date at Port Orchard, Wash. 11/23/35, for the sum of fifteen hundred dollars, signed by Bessie Bilquist, William E. Bilquist, John Myhre [86] and Signe Myhre, payable to the order of the Kitsap County Bank, at its office at Port Orchard, Washington, two years after date with interest after date at 8 per cent per annum, principal and interest payable monthly $25.00 and interest to March 1, 1936, and $50.00 thereafter.

I am familiar with the value of real estate around south Kitsap County.

On

Examination upon voir dire

by Mr. Groff, he testified as follows:

I am familiar with the property known as the Ballard or Neubling property, having known it for several years. I have been 20 years in the community. I go over there several times a month. There are two ways of arriving at value; what it would sell for and what it would cost to reproduce the building—that is about all. You gather all the information you can of all property that has been sold surrounding that property—if sold within some short time we give it consideration. We make inquiry from a man who does not have to buy and is

(Testimony of Frank E. Langer.)

willing to buy and from a person who does not have to sell but is willing to sell, and that way get market value. This property was last sold to Haas for $2500.00.

Direct Examination.

of the witness F. E. Langer being resumed, he further testified as follows:

In my opinion the reasonable value of the building was $3000.00, and of the land, about $900.00. When I wrote this policy Mr. and Mrs. Bilquist had already moved in. I knew it was an inn and had known it 4 or 5 years. My family and I had Sunday dinner there twice before.

I first learned of the fire from Myhre the same day in the morning. I told him I would write the company, and I did. Mr. Kelly, an adjuster, came over to Port Orchard a day or two later. Myhre came in from time to time. He wanted to know when the claim [87] would be settled. I told him I didn't know, but that I was in direct communication with the company, and as far as I knew, it would be adjusted in time. Myhre and I made a trip to Seattle to find out whether the company would pay it. We went to the office of the United States Fidelity & Guaranty Company and talked with Mr. Edwards. In matters pertaining to my agency I have dealt with him. He said there was some dispute as to whether the fire had been set and he did not think they would pay the claim. One

(Testimony of Frank E. Langer.)
reason was that there had been a beer parlor put in there. He said proof of loss had not been filed within 60 days. Nobody received a form for proof of loss that I know of.

Upon

Cross Examination

the witness F. E. Langer further testified as follows:

I am 48 years old and have been in the banking business since I got through the University in 1914 —first at North Bend, and later at Sunnyside. I studied law at the University. From North Bend I went to Port Orchard. After a year I went to Sunnyside. After about a year I purchased the bank and became manager. At all the banks I have been connected with some person connected with the institution wrote fire insurance. During the 19 years I have been writing fire insurance on all kinds of property. I write some on the business property downtown. I do not write the insurance on Myhre's beer saloon and restaurant.

Business property carries a different rate from a dwelling. The rates are set by the state through the Insurance Department and Rating Bureau. From time to time I have called upon them, or asked through our general agent, to ask what a rate was.

When I get a prospect for insurance I ask him questions and write them down or have him write them down on a blank, and send the information

(Testimony of Frank E. Langer.)

to the general offices which writes the policies, puts in the rate and sends the policy to me, and I sign it, turn it [88] over to the prospect and collect the premium.

Blanks such as defendant's Exhibit "A-1" were furnished me by McCollister & Campbell, the general agents. I think I sent that writing to McCollister & Campbell. It was my application for the policy in question."

Defendant's Exhibit "A-1", offered on behalf of the defendant, admitted.

DEFENDANT'S EXHIBIT "A-1"

is Standard Forms Bureau Form No. 528, with the signature of F. E. Langer in typewriting appended thereto, and, except as to the aforesaid signature being typewritten, it is as to form and as to the entries and filling of the blank spaces thereof identical with Standard Forms Bureau Form No. 528 attached to and made a part of the policy, Plaintiffs' Exhibit 1.

At the time I knew that Myhre claimed to have an interest in the property, I do not know why I did not put his name in the application. I always put in the person who has an insurable interest. I noticed that Myhre had put money into the purchase of the business. In what portion, I didn't know and still don't know. I knew that Bil-

(Testimony of Frank E. Langer.)

quist had an interest in the building and that he was going to live there, and make that his home. I presume that is the reason. Myhre said he wanted his name to appear in the policy, so I figured that as long as he had an interest I would put it in as third mortgagee. There was a second mortgage to Jones, and the bank had the first mortgage. I figured I would protect him by putting in him as third mortgagee.

When the policy was first written Myhre and Bilquist had a loan of $1500.00 and it was the policy of the bank to keep the insurance with the mortgage and the abstract. Neither Myhre nor Bilquist asked for the policy or examined it until after the first mortgage had been reduced by about a thousand dollars; then they wanted me to take up the second mortgage, which I did. Then we [89] made a new mortgage and it was at that time Myhre came in and asked to see the policy, and he examined it, and said his name did not appear in the policy, and as he was a part owner in the business he wanted his name to appear in the policy.

I misrepresented the ownership of the property when I made the application that Bilquist was the owner. I am familiar with the conditions of the policy. I have made no endorsement on the policy that waives any of its provisions.

Myhre has been a customer of the bank for a considerable time. His credit is good and we have made him accommodations on his note from time to time. Bilquist I did not know. His interest was

(Testimony of Frank E. Langer.)

primarily brought to my attention by the interest of Myhre.

I have been there 20 years and the inn was in Manchester when I came. It is about a block from the highway. There was a sign on the building and a big sign on the county road that pointed to Manchester Inn before Bilquist came there. I was in the property several times before he bought it. I would say that the building was a least twenty-five or thirty years old. It is a frame building with a long porch over the Bay side. I went down there with Haas, who is in the real estate business. We went through the building and examined it. It was old, but in fairly good condition—a two story building with 11 rooms upstairs, a nice big dining room, and a kitchen and lobby below. It was on a foundation of cedar posts.

I often appraise buildings. We loan on a mortgage from fifty to sixty-five per cent. The first mortgage was $1500.00. I think it was a reasonable loan on that property. I figured the waterfront at ten dollars per front foot, which would make the land worth $1000.00. The Puget Sound Timber Company sold all their waterfront there for ten dollars a front foot. They left the timber on. The property we were speaking of has been improved many years, [90] and a little creek comes through it into the bay.

In July 1935 I had conversation with Myhre about assisting Bilquist to locate in this community. Myhre came in to see me about it. I knew both

(Testimony of Frank E. Langer.)

Mr. and Mrs. Ballard. On the strength of Myhre's credit, I loaned these people $1500.00. Mrs. Applegate took the abstract and had the papers signed and took the papers over to the abstractor and he brought it down. I didn't handle the abstract myself. Mrs. Applegate was a lawyer. She put an insurance policy on the improvements and furniture. I had her cancel it when I wrote the insurance.

On July 23d I had Mr. and Mrs. Bilquist and Mr. and Mrs. Myhre execute the note for $1500.00 with 8% interest secured by mortgage on the premises. From time to time payments were made by Myhre. Later they interested me in making an advance sufficient to pay Jones and put all the indebtedness with the bank. I own control of the bank. I have enough stock to control the Board of Directors.

The money from insurance goes to me personally. As principal stockholder of the bank, I had an exceptional interest in the mortgage. I do not know any reason why the policy wasn't put in both names. I have written insurance for twenty years. Mrs. Applegate wrote the first mortgage. I wrote the second. We keep the abstract and the fire insurance policy until the mortgage is paid. Anything about the policy that Myhre, or anyone else, wanted explained, I explained as far as I could. I was not there after the place was turned into a beer parlor. I had no knowledge of how they conducted their business. I never permitted them, orally or otherwise, to open a beer parlor on the premises.

(Testimony of Frank E. Langer.)

Upon

Redirect Examination

the witness F. E. Langer further testified as follows:

Plaintiffs' Exhibit 6 is the second note I took at the time [91] I took up the second mortgage and put it all in one, and this time we advanced $2150.00.

Plaintiffs' Exhibit No. 6, offered in behalf of the plaintiffs, was received.

PLAINTIFFS' EXHIBIT 6

is a promissory note bearing date Port Orchard, Washington, July 28, 1936, for the sum of twenty-one hundred and fifty and no/100 dollars, signed by Bessie Bilquist, William Bilquist, John Myhre and Signe Myhre, payable to the order of the Kitsap County Bank at its office in Port Orchard, Washington, on or before four years after date, with interest after date at the rate of eight per cent per annum, principal and interest payable $35.00 per month and interest for first year and $50.00 per month and interest thereafter.

I am still agent for McCollister & Campbell, the same as I have always been.

Upon

Recross Examination,

the witness F. E. Langer further testified as follows:

I knew that this place was built for an inn and

(Testimony of Frank E. Langer.)

was used as an inn and that Bilquist was going to engage in the same line of business, and I suppose I knew it was not going to be used exclusively as a dwelling.

WILLIAM GILBERT,

called and sworn as a witness on behalf of the plaintiffs, upon direct examination testified as follows:

The fire originated on the east end of the building on the opposite side from the beer parlor, but at the other end.

Upon

Cross Examination,

the witness William Gilbert further testified as follows:

The building was not long in burning.

JOSEPH HAAS,

called and sworn as a witness for the plaintiffs, upon direct examination testified as follows:

My name is Joseph Haas. I have been in the real estate [92] business 8 years—five years at Port Orchard—and during that time I have dealt in beach property and real estate such as exists in the south end of Kitsap County. I sold the Manchester Inn to these parties and I am acquainted with the value of property. On July 25, 1935, I valued the building

(Testimony of Joseph Haas.)
at approximately $3000.00 and the land at between $840.00 and $1000.00.

Upon

Cross Examination

the witness Joseph Haas further testified as follows:

I write fire insurance. We insure only the building; the front foot worth is immaterial. I am familiar with the Rating Bureau. They make the rates for all the companies and their agents.

Witness shown defendant's Exhibit "A-2", states that it is the fire insurance rates.

"I paid $2500.00 for the building and land. Mr. Ballard, who owned the property, was sick and there was a contract foreclosure threatened on it. They had no means, and he had to take what was offered or lose the whole thing. I bought it for fifty cents on the dollar, cash. Neubling had the title. I received the deed from Neubling, who lived in New York.

If a building is exposed to the sea, as this one was, when it will wear out depends upon how the building is taken care of. The place was painted and in condition, but the exterior was weatherbeaten. I loan money on mortgages. I would have loaned $2500.00 on the land and building at 8 per cent. In determining the value of this property, I took into consideration that it had 11 rooms upstairs, a large dining room, a bed room, a lobby, a fireplace, kitchen, and water system. A new building would cost three times as much. The building was up on

(Testimony of Joseph Haas.)

blocks. There was no way of heating the upstairs bed rooms unless a furnace were put in. There was a bathroom and a toilet room upstairs and running water [93] in them. We call anything with a bathroom and running water in the kitchen modern. I would have recommended to any investor that he could safely have paid $3000.00 for the building. I just sold a $6000.00 house not far from there. There were lots of buildings around the bay used as dwellings that would stand $2500.00 insurance.

Thereupon the plaintiffs rested.

The plaintiffs having rested, the defendant renewed its previous motion to strike all testimony in behalf of the plaintiffs that in any way tends to modify or waive any provision of the insurance policy, the basis of this action, as an attempt to vary by parole evidence the terms of a written contract.

The defendant's said motion was denied. The defendant seasonably asked and was allowed an exception thereto. The plaintiffs having rested, the defendant moved that the court take the case from the further consideration of the jury and direct a verdict in favor of the defendant.

The defendant's said motion was denied. The defendant seasonably asked and was allowed an exception thereto.

Thereupon

LEONARD L. EDWARDS,

called and sworn as a witness for the defendant, testified as follows:

My name is Leonard L. Edwards. I am associated with the firm of McCollister & Campbell and I have charge of fire insurance. Witness shown defendant's Exhibit "A-1", said that it was the application received from our agent at Port Orchard for the execution of the policy. This application is the necessary description of the location of the property, the kind of property, the amount of insurance desired, the amount of indebtedness on it, the information necessary to arrive at a proper rate. This application was received by us.

Shown Plaintiffs' Exhibit No. 1, the witness said that it [94] was the policy issued in connection with that application.

The policy is known as the New York Standard Form; it is universally used throughout the United States. The form of policy has been used in this state since 1911. The signatures on the policy are of the principal officers of the company in Baltimore. The soliciting agent signs the policy because it gives him prestige to have his signature on the policy. He represents the company within his limitations and is the man that secures the business. The policy was drawn in our office under the application received from Langer at Port Orchard.

Shown defendant's Exhibit "A-2", the witness said, "It is a published rate sheet issued by the

(Testimony of Leonard L. Edwards.)

Washington Surveying and Rating Bureau, a bureau under the supervision of the Insurance Department of the State of Washington, and shows the individual annual rate to be on each risk located in Manchester other than dwellings. The application indicates a dwelling occupied by the owner with shingle roof, electric lights, without foundations, with a brick chimney; all its rooms plastered, and that it had not been painted within five years; that the annual rate was $1.10, the 3-year rate $1.92. The premium on the 3-year rating amounted to $77.00. Had the status of the property been truthfully stated in the policy, the applicable rate on this particular property would have been $3.46 for a year.

Defendant's Exhibit "A-2", offered in behalf of the defendant, and admitted.

DEFENDANT'S EXHIBIT "A-2",

eliminating reference to certain properties not covered by the policy of insurance and otherwise owned and located, reads as follows:

Kitsap County, Washington Manchester Page 1

Line	Location	Class	Risk	Bldg.	Cont's.
28	Sheet 1, Block 201		2 Sty Fr.		
29	800 ft S. of wharf	D	(Manchester Hotel	3.46	3.46

[95]

We first learned that a misrepresentation had been made to us as to the ownership and classification of this risk when we sent our adjuster there for a preliminary investigation of the loss. This is

(Testimony of Leonard L. Edwards.)

a custom common to all insurance companies and done to protect both the company and the policy holder. Information was brought back to us by the adjuster that Bilquist was not the sole owner; that the property was not a dwelling, but was a beer parlor, hotel and dance hall.

Our evidence disclosed that it never was used as a dwelling after the date of its insurance; that the beer parlor was installed approximately April 1, 1936, and was in full force at the time of the loss.

We did not give Langer authority to write policies. We did not provide Langer with rate sheets. Every registered agent has one.

Upon

Cross Examination

the witness Leonard L. Edwards further testified as follows:

The witness' attention was addressed to Defendant's Exhibit "A-1", and he said:

These forms are supplied by what we call the Standard Forms Bureau. It is what we term an unprotected dwelling form. We start with a basic rate and give certain credit for structural improvements, and so forth. It becomes a warranty on the policy based on that statement and a part of the policy. That is why that form is used.

The agent at Port Orchard is supplied with rates for Port Orchard. As to Manchester, I do not know. He would be supplied if he requested them. In a

(Testimony of Leonard L. Edwards.)
dwelling risk of this class there isn't any special published rate, and the rate is applied from the general tariff. When an application comes in for an ordinary dwelling we would not resort to the survey of the lot described to see what kind of a building was on it. If the application had come in [96] showing it as the Manchester Hotel, the rate as shown by the rate sheet would have applied. When I receive a dwelling house application I apply the dwelling house tariff. Langer also had standard forms for business property. We got our report from the adjuster right away after the loss occurred and determined that the policy should not be paid.

Upon

Redirect Examination

the witness Leonard L. Edwards further testified as follows:

I communicated the information to Myhre that we were not going to pay the policy, before the 60-day period had elapsed. Langer is a responsible citizen of Port Orchard and has been an agent of our office for sixteen years. When we receive an application from any agent directing us to prepare a policy, we prepare it in accordance with those directions. The instructions that Langer asked us to prepare on are contained in the application, and there is no difference between those instructions and this policy as prepared. The application is made a part and parcel of the policy and was a part of the policy when it was sent to Langer. I have

(Testimony of Leonard L. Edwards.)
been writing fire insurance policies for twenty-two years. The installation of a bar room and a dance hall and the bringing in of an outsider as an associate in the conduct of the bar room increases the risk.

BURT ROGERS,

called and sworn as a witness for the defendant, upon direct examination testified as folllows:

My name is Burt Rogers. I came to Manchester in 1907 and have lived there ever since. I own quite a little property in that vicinity. I reside a short distance from the place that was destroyed. I have known the Manchester Inn ever since it was built. I sold the property to the original purchaser. I sold two lots for one thousand dollars. Mr. Neubling constructed a club or hotel there that was called and advertised as the Manchester Inn. That [97] was the building that stood there before the fire. Neubling and his wife and boy operated it for a good many years; then he sold to Mr. and Mrs. Ballard, who operated it a number of years as an inn. Mrs. Ballard died some years ago, and after that Mr. Ballard and his sister-in-law operated it for a little while.

For a couple of years before it was sold to Haas there was somebody on the property, but it was not run at all. From the time the building was built it was shingled a couple of times. Outside of that, I

(Testimony of Burt Rogers.)

do not know of any repairs made on the property. I testified at a hearing before Judge Sutton in Port Orchard on the value of this building. I placed it at a thousand dollars. It is practically of the same value now.

Upon

Cross Examination,

the witness Burt Rogers further testified as follows:

I fixed the value of this building at one thousand dollars when the Ballard estate was settled up before these people bought it. After they went in I never saw it except on the outside. If they put anything on the outside, I never saw it. If they put in $700.00 in improvements, that would increase the value accordingly. At the time I appraised it, it was practically vacant and inoperative for any purpose. I was told by proper authorities to appraise it at what I thought it was actually worth and would bring at a sale. The building cost $2500.00 in 1909; carpenter labor and lumber was very cheap then. The lumber was brought from Seattle. I know it would cost a great deal more to build it now—probably twice as much. I appraised it in 1934.

Upon

Redirect Examination,

the witness Burt Rogers further testified as follows:

When I testified before Judge Sutton, the valuation was tried to be raised.

(Testimony of Burt Rogers.)

Upon

Recross Examination,

the witness Burt Rogers further [98] testified as follows:

The complaint of exposure at the inn was that a couple came out of the hotel, the man was in a bathing suit, and after he was outside he indecently exposed himself in front of the hotel.

SAM H. DENNISON,

called and sworn as a witness for the defendant, upon direct examination testified as follows:

My name is Sam H. Dennison. I am 46 years old. I reside a short distance from where the inn was located in Manchester. I have lived in that neighborhood off and on since 1900. For a short time during the war I worked in the ship yards at Olympia, and then for about three years I was in the building and contracting business in Seattle. My business was formerly, for about 8 years, contracting and building. I am in the poultry business now. I built six or eight residences in Manchester before the war. I am familiar with the property known as Manchester Inn. I was there to two dinners while Bilquist conducted it, but before the beer parlor was installed, at a benefit dinner for the Community Club. I have been around and by the hotel since the beer parlor and dance hall was opened, but never in it.

(Testimony of Sam H. Dennison.)

I was familiar with the hotel when built. It was constructed about as cheaply as it could be built at that time just to make an inn for a summer proposition. They made their money from people coming there in the summer to board and room. From the time it was constructed to the time it was destroyed by fire there was very little difference in the outside appearance, except that the Bilquists improved the front porch. That was about all they did to the outside.

They built a small garage behind the hotel. Cars were parked around and under the hotel. There was room for two under there close to the front porch. The side of the wall was boarded up to skirt the basement; there were posts in between, and they ran [99] the cars in between the posts. By the wall, I mean the wooden boards; they made a door out of these. The place underneath the porch was open so people could get in there. From my consideration of the depreciation of the building, I would say a thousand dollars would be a good appraisal on the house. I would not want to buy it for that. I was present at the hearing the State Board had. This was one of the institutions that was under question by the Board.

Upon

Cross Examination,

the witness Sam H. Dennison further testified as follows:

(Testimony of Sam H. Dennison.)

I testified against all of them. I have not been antagonistic against these people. I am against liquor, but if the thing is run right I would not say a word.

ALLAN V. KELLY,

called and sworn as a witness for the defendant, upon

Direct Examination

testified as follows:

My name is Allan V. Kelly. I reside in Seattle, and I have been a fire insurance adjuster and appraiser for the past ten or fifteen years. Appraisals mean appraising real and personal property for valuations and insurance purposes. I am the Allan V. Kelly mentioned by Mr. Greenwood as the man who appeared upon the scene after the fire. I interviewed some of the people in the community. I gave no indication to them what my report would be.

I have had sixteen years' experience in appraising property. I started work for mortgage companies that took in real property and buildings. I have had experience in appraising unprotected property or property out in small villages and towns. I have appraised many individual buildings, dwellings and school houses. The depreciation in such a house depends upon the foundation, mainly, and the general upkeep. It runs from three to four per cent per year until it has depreciated at least

(Testimony of Allan V. Kelly.)

seventy per cent. At that time it would be habitable, but the value would be cut [100] down.

I would say it would be hard to figure the value of the building in September 1936 up to one thousand dollars. In my 16 years as an insurance adjuster I have had a great deal of experience in investigating fires and the increase or decrease in risk. Assuming that the hotel under discussion had been conducted as a seasonal hotel for guests, or an inn where meals and lodgings were furnished during the summer of 1935, and in the spring of 1936, a ballroom, a piano player, and a bar were placed in the property, I would say that it would increase the hazard considerably.

I am an independent adjuster with my own office and office force. I adjust for any company that will employ me. I have no connection with McCollister & Campbell except when called to make an adjustment. It is a part of my preliminary survey to learn whether the right rate has been charged. Circumstances change rates.

Shown defendant's Exhibit "A-2", the witness stated that it was a rate sheet sent out by the Washington Surveying and Rating Bureau, setting out rates on certain property in the Manchester section.

An unprotected dwelling located as this building would have a basic rate of $1.75 per year, subject to a thirty per cent deviation. The roadhouse, dance hall and beer parlor rates are rated as one and combined, usually $5.00 a year, subject to a thirty per

(Testimony of Allan V. Kelly.)

cent deviation. An unprotected dwelling can be written for three years for two and a half annual premiums, while a beer parlor can only be written on an annual basis. The true rate on this risk, had it been properly and correctly described, would have been a basic rate of five dollars per hundred for a year, subject to a thirty per cent deviation. There would also have been a charge for automobiles that were kept under the front porch. That probably [101] would have been as much as fifty cents per hundred per year; then there would also have been a charge for chimney on brackets and other points that I don't know about in that building; or there would have been a credit for electric lights. There would have been no credit for a foundation, because of being on posts. The exhibit as to this particular property shows a survey made July 30, 1936, and a rate of $3.46. This is the rate as a hotel and not a beer parlor. The rate would not be less than $3.46.

Upon

Cross Examination,

the witness Allan V. Kelly further testified as follows:

I went over the day of the fire. I talked to Mr. and Mrs. Bilquist, but not to Myhre or Langer. It was about a week after that I went to the bank. I did not tell him I was advising the company not to pay the loss. My employment is entirely by insurance companies. I never saw the building myself. If $700.00 were put into improvements in the in-

(Testimony of Allan V. Kelly.)
terior, that would not be added to my valuation; it is not figured that way. It is a matter of general upkeep that goes along; otherwise your depreciation would be much heavier than three or four per cent. If the improvements had been there, I would not say what they would be worth, but it would be worth less than the cost.

Upon

Redirect Examination,

the witness Allan V. Kelly further testified as follows:

The improvements added some value to the property.

LEONARD L. EDWARDS,

recalled as a witness for the defendant, upon

Direct Examination

further testified as follows:

The witness shown defendant's Exhibit "A-3", stated that it was duplicate copy of the last rating sheet showing the rate on the Manchester Inn, which was made on March 29, 1934, when it was rated as a hotel and lodging house. This is an exact copy of the record of the Rating Bureau secured from the Bureau. It was in effect on [102] August 10, 1935. I got it this morning. I could always have gone and gotten it. There has been no rating since.

(Testimony of Leonard L. Edwards.)

Defendant's Exhibit "A-3" offered on behalf of the defendant and received.

DEFENDANT'S EXHIBIT "A-3"

is a copy from the records of the Rating Bureau of its last survey of the property known as Manchester Inn, and reads as follows:

GENERAL BASIC SCHEDULE

SHEET. I. 800 ft. South of Dock. Block 201.			
MAP. On Puget Sound.			
TOWN. Manchester.			
TOWN CLASS. IoTh.			
BUILDING NAME. Manchester Inn.			
INSPECTED BY. J. A. Sodeberg.			
MEMORANDA. Date 3/29/34			
HEIGHT. 2 and B.	Charges	.02	
AREA. 32x59 plus 35x6 2098 ft.			
WALL. Frame.		1.00	
FOUNDATIONS. Enclosed.		.20	
ROOF SURFACING. Shingle.		.20	
ROOF SPACE. Yes.		.02	
COMBUSTIBLE CONSTRUCTION.			
100% Gross Charge .80. Net charge .80			
TOTAL NET CHARGE.			.80
STAIRS OPEN. Story 1-2 Charge .05			
" O/S to basement S & B			
INTERIOR FINISH. L. & P. Total charges			.05
CHIMNEYS. B.C.B.			.05
OCCUPANCY			1.30
TOTAL STRUCTURE AND OCCUPANCY CHARGES			3.49
PROTECTIVE FEATURES.			
FIRST AID APPLIANCES (I) N.S 1½ Gr. C.T.C.			
DIVERGENCY CHARGE.			.35
			3.84

(Testimony of Leonard L. Edwards.)

CONSTRUCTION GRADE C-3
COMBINATION WALLS 100% Div. factor .85
NET UNEXPOSED BUILDING RATE 3.26
EXPOSURE TABLE.
TOTAL COLUMN I CHARGE .70
MULTIPLY BY .85
NET EXPOSURE BASE .59
NET UNEXPOSED BUILDING RATE 3.26
CONTENTS RATIO .80
CONTENTS RATES SUSC. C. SUSC. CHARGE .30
GROSS FLAT RATE 3.46
OCCUPANCY TABLE. Susc. Class C Manchester Inn. C-3
Loca D. Column I, 110
Column 2 10
In use four months of the year. 10 Guest rooms.
Fireplace heat in lobby.
Cooking on coal range .10
Class J. load A/C Seasonal resort.
Total charges Column I 1.20
Highest charge Column 2 .10

[103]

I know why the exhibit is dated on the top of the sheet. On lines 8 and 9, the buildings were removed, effective 6/30/36. They republished the whole sheet. Lines 8 and 9 refer to a garage and automobile station at Manchester. Any time any of these are changed they republish this sheet, and so it was republished last July 30, 1936, although none of these other risks might have been affected for nine or ten years.

Upon

Cross Examination

the witness Leonard L. Edwards further testified as follows:

The Rating Bureau does not keep the rating sheet up to date; but it will make a new rate at any time,

(Testimony of Leonard L. Edwards.)
upon application by anyone interested. The Rating Bureau is owned by an independent company and is maintained by the State of Washington through contributions from all insurance companies.

Thereupon the defendant rested.

Thereupon the plaintiffs rested.

The foregoing is a full, true and complete statement, in narrative form, of all evidence offered and received upon the trial of the above entitled cause and of all exhibits received and admitted in the trial of said cause.

Upon the close of all the evidence, the defendant renewed its motion made at the close of the plaintiffs' testimony to strike the evidence tending to vary the contract of the policy by parole evidence, and moved the court to strike from the record all testimony adduced by or on behalf of the plaintiffs in any way tending to alter or modify by parole testimony the policy of insurance upon which this action is based.

The motion being by the court denied, the defendant seasonably asked and was allowed an exception.

Thereupon the defendant, at the close of all the evidence, renewed its motion for a directed verdict and challenged the legal [104] sufficiency of the evidence to sustain a verdict for the plaintiffs and

moved that the court direct the jury to return a verdict for the defendant.

The motion was denied, and the defendant seasonably asked and was allowed an exception thereto.

Before submitting the case to the jury, the court said: "I think that upon the status of the authorities that the court ought to resolve whatever doubt there is on the subject in such a way that the proceedings will result and end up in such shape so that whatever view the appellate court might have on it could be eventuated without a new trial. Whatever doubts I have in mind should be reserved to the conclusion of the trial so that the matter can be in such shape that the ruling of the appellate court will leave nothing to be done except to enter judgment to whichever party the appellate court thinks ought to have it," and submitted the action to the jury subject to a later determination of the legal questions raised by the defendant's motion for a directed verdict.

The cause being submitted to the jury, reserving all questions of law arising under defendant's motion for a directed verdict, the jury on the 1st day of February, 1938, returned into court their verdict for the plaintiffs to recover of the defendant the sum of four thousand dollars. [105]

On the 5th day of February, 1938, the defendant served upon counsel for plaintiffs, and on the 7th day of February, 1938, filed with the clerk its motion that the court enter a judgment for the de-

fendant notwithstanding the verdict of the jury, because, under the terms of the policy of insurance upon which recovery was sought, the knowledge of the agent as shown by the evidence was not sufficient to justify a recovery for a loss by fire where the building was used as an inn or hotel, nor for other than dwelling house purposes only, and no issue of fact existed material to the alleged right of the plaintiff to recover, necessary or proper to be submitted to a jury.

The defendant's motion for a judgment notwithstanding the verdict of the jury coming on for hearing and being argued by counsel, it was by the court denied.

The defendant seasonably asked and was allowed an exception to the order of the court denying such motion, upon the following grounds:

1. Because it appears by the uncontradicted evidence that at the time of the loss for which the plaintiffs seek recovery under the policy sued upon, the insured real property was not being used only for dwelling house purposes, nor was the insured property located in a dwelling house building.

2. Because it appears by the uncontradicted evidence that subsequent to the issuing of the policy of insurance upon which the plaintiffs sue, the hazard of the insurance was increased with the consent and under the control of [120] the insured through the use of the insured premises as a place for the sale of beer and

wine to the public and as a place of public dancing, and that by reason thereof the policy became void.

3. Because it appears that at the time of the issuing of the policy of insurance on which plaintiffs sue, and at the time of the loss, the interest of the insured William E. Bilquist in the insured property was other than that of sole and unconditional ownership, and that by reason thereof the policy was void.

Upon denying the defendant's motion for a judgment notwithstanding the verdict, and in the alternative for a new trial, the court prepared and filed its written memorandum decision, which was and is in the words and figures following, omitting the caption:

At the time this case was submitted to the jury it had not been made entirely clear to this court what effect our state court decisions have upon the issues here, but in view of the last paragraph of the court's opinion in the case of Penman v. St. Paul Fire & Marine Insurance Co., 216 U. S. 311, at page 322, which appears to have left that question open, and in view of the decision of our State Supreme Court in Harper v. Firemen's Fund Insurance Co., 154 Wash. 77, holding the insurer liable upon facts very similar to those here, I submitted this case to the jury, which found for the insured.

Upon the argument of the motions for judgment n. o. v. or for a new trial, the parties seemed to

agree that the decisions of the federal courts, if applicable, controlled the determination of the issues here to the exclusion of our state court decisions. On these motions the first inquiry then is: Are there any controlling federal court cases?

The insurer contends that Northern Assurance Co. v. Grandview Building Association, 183 U. S. 308, and Eddy v. National Union Indemnity Co., 80 F.(2d) 284 (9th CCA), involved facts on all fours, or nearly so, with the facts in the case at bar and that those cases do control here and make erroneous the action of this [121] court in submitting this case to the jury.

In those cases, it seems to me, the insured took some part in disclosing to the insurance agent some of the conditions misstated in or prohibited by the policy, but in the case at bar the insured took no part in ascertaining for or disclosing to the insurer or its agent the facts or terms of the policy. The insured here merely assented to the writing of the insurance by the insurer's agent, and the latter who for the purpose of writing this insurance exercised general authority and alone for the company executed the policy, undertook to and did ascertain or know all of the facts concerning the use of the insured property at the inception of the policy and regarding which facts the contract conditions are now in dispute. All that was done before and at the beginning of the contract relationship which is now objected to was done by the insurer and its agent and that seems to me to distinguish this case from

those relied upon by the insurer. (The question whether changes in the property's use made after execution of the policy increased the risk was appropriately submitted to the jury which found against the insurer.) I cannot therefore apply the rule of the Northern Assurance Company case (183 U. S. 308) and of the Eddy case (80 F.(2d) 284) because of their above mentioned distinguishing facts and because to apply that rule here where the insurance company did everything (except that relating to subsequent changes in use of the property) it now complains of would cause such obvious injustice to the insured, without legal excuse.

The motions for judgment n. o. v. or for a new trial will be denied.

This memorandum decision is substituted for and will take the place of all oral statements made by the court concerning those motions at the argument upon them.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6 and 7, and Defendant's [122] Exhibits A-1, A-2 and A-3, are by the court's order forwarded direct to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

At the time of filing its motion for a judgment notwithstanding the verdict, the defendant filed its motion in the alternative, in the event of the denial of such motion for a new trial, which motion was by leave of court withdrawn.

There was judgment on the verdict, and the defendant appeals.

And the defendant prays that this, its bill of exceptions, may be allowed, settled and signed.

FIDELITY AND GUARANTY
FIRE CORPORATION
By DAVIS AND GROFF
Its Attorneys of Record [123]

[Title of District Court and Cause.]

CERTIFICATE OF JUDGE SETTLING BILL OF EXCEPTIONS

I, John C. Bowen, District Judge of the above entitled court, who presided in the trial of the above entitled cause in the above entitled court, and before whom all matters and proceedings in the above entitled cause were heard, do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in said cause and in the trial thereof, and that the foregoing Bill of Exceptions contains all of the material facts, matters, things, proceedings, rulings and exceptions thereto, occurring upon the trial of said cause and not heretofore a part of the record herein, and includes all of the evidence adduced at said trial, and that the exhibits set forth or referred to, or both, in the foregoing Bill of Exceptions constitute all of the exhibits offered in evidence in said trial, and I hereby make said exhibits a part of the foregoing Bill of Exceptions.

I do further certify that I do hereby approve, sign, certify and settle the foregoing Bill of Exceptions as a full, true and correct Bill of Exceptions in this cause, and that the same is in proper form and conforms to the truth; and the clerk of this court is hereby ordered to file the same as a part of the record in said cause, and further to attach to the said Bill of Exceptions all the exhibits not set forth therein; and to transmit the said [124] entire Bill of Exceptions, including all exhibits whatsoever, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the foregoing Bill of Exceptions has been and now is settled, certified and approved within the judgment term and within the time provided for filing, presentation, settling and certifying such Bill of Exceptions.

Done in Open Court this 11th day of April, 1938.

JOHN C. BOWEN
District Judge

Approved.

DAVIS and GROFF
Counsel for Fidelity and
Guaranty Fire Corp.

RAY R. GREENWOOD and
H. SYLVESTER GARVIN
Attys for Bilquist et al

[Endorsed]: Lodged Mar. 28, 1938. [125]

[Endorsed]: Filed Apr. 11, 1938.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable John C. Bowen, Judge of the District Court Aforesaid:

Now comes the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, by Davis & Groff, its attorneys, and respectfully shows that on the first day of February, 1938, a jury in said court duly impanelled and sworn in the above entitled cause, found and returned into court a verdict against your petitioner and in favor of the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, and on said verdict a final judgment was, on the 28th day of February, 1938, in said above entitled court, entered against your petitioner, Fidelity and Guaranty Fire Corporation of Baltimore.

That said cause is one wherein the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, seek recovery of and from the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, your petitioner, of the sum of four thousand dollars upon a policy of fire insurance issued by the defendant, your petitioner, to the plaintiff William E. Bilquist on the 10th day of August, 1935, insuring the said William E. Bilquist against direct loss or damage by fire of a certain two-story frame building and household furniture and personal effects contained therein while used and occupied only for

dwelling house purposes, and the case is one in [126] which, under the legislation in force when the act of January 31, 1938, was passed, a review could be had on writ of error.

Your petitioner, feeling itself aggrieved by the said judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United States in such cases made and provided, for the reasons specified in the assignment of errors filed herewith.

Wherefore, the premises considered, your petitioner prays that an appeal in this behalf to the United States Circuit Court of Appeals, aforesaid, sitting at San Francisco in the State of California in said circuit, for the correction of the errors complained of, and herewith assigned, be allowed to your petitioner, and that an order be made fixing the amount of security to be given by your petitioner, conditioned as the law directs, to operate also as a supersedeas bond on appeal, and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, will be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco in the State of California, and upon the furnishing and approval of such bond by the court, that all proceedings upon such judgment be

suspended until the determination of such appeal by the United States Circuit Court of Appeals.

Dated 8th day of April, 1938.

FIDELITY AND GUARANTY
FIRE CORPORATION,
Petitioner and Defendant
By DAVIS and GROFF
Its Attorneys

[Endorsed]: Filed Apr. 8, 1938. [127]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the Fidelity and Guaranty Fire Corporation (of Baltimore), defendant in the above numbered and entitled cause, and, in connection with its petition for an appeal in this cause, assigns the following errors which appellant avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein, as appears of record:

First: In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court instruct the jury to return a verdict for the defendant because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been, used and occupied as an inn or hotel and as a beer parlor and place for the

public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by the fire was not household furniture nor personal effects and were not at the time of their destruction by fire contained in a dwelling house building, and that the loss for which the plaintiffs seek re- [128] covery was not one within the undertaking of the defendant under its said policy of insurance, for recovery under which plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes and to household furniture and personal effects while contained in such dwelling house building.

Second: In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been, used and occupied as an inn or hotel and as a beer parlor and place for the public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by the fire was not household furniture nor personal effects and were not at the time of their destruction by fire contained in a dwelling house building, and that the loss for which the plaintiffs seek recovery was not one within the undertaking of the defendant under

its policy of insurance, for recovery under which the plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes and to household furniture and personal effects while contained in such dwelling house building.

Third: In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court direct the jury to return a verdict for the defendant because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which the plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and from about April 1st, [129] 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the meaning and intent of the provisions of the said policy in that the entire policy shall be void, unless otherwise provided by agreement endorsed upon or added thereto, if the hazard be increased by any means within the control or knowledge of the insured, and that no agreement other-

wise providing had been endorsed upon such policy, nor added thereto.

Fourth: In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and that from about April 1st, 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, and with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the intent and meaning of the express provisions of said policy in that the entire policy shall be void, unless otherwise provided by agreement endorsed upon said policy or added thereto, if the hazard be increased by any means within the control or knowledge of the [130] insured, and that no agreement otherwise providing had been endorsed upon such policy, nor added thereto.

Fifth: In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court in-

struct the jury to return a verdict for the defendant because it appears by the uncontradicted evidence that it was provided in the policy of insurance, for recovery under which the plaintiffs sue, that the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the interest of the insured be other than sole and unconditional ownership; that it was not otherwise provided by agreement endorsed upon or added to such policy, and that the interest of the insured was not that of sole and unconditional ownership, and that John Myhre, at the time of the issuing of such policy and thence until and at the time of the occurrence of the loss, was an equal half owner of the insured property as a tenant in common with the insured.

Sixth: In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears from the uncontradicted evidence that it was provided in the policy of insurance, for recovery upon which the plaintiffs sue, that the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the interest of the insured be other than sole and unconditional ownership; that it was not otherwise provided by agreement endorsed upon or added to said policy; that the interest of the insured was not that of sole and unconditional ownership; and that John Myhre at the time of the issuing of such policy, and thence until and at the time of the oc-

currence of the loss, was an equal half owner of the insured property as tenant in common with the insured. [131]

Seventh: In instructing the jury that if Langer was the agent for the insurance company and acquired knowledge of the ownership and proposed use of the building insured so recently as to reasonably warrant the assumption that he had such knowledge when he wrote the policy, then you will find that such knowledge on his part is imputed to the insurance company for which he acted, and the company having collected a premium and delivered a policy, knowing these conditions to be, will be deemed to have waived them, unless you find that the agent's relation to the insured property or to the transaction was such as to destroy the agency relation existing between him and the insurance company, or unless you find that the agent and the insured plaintiffs colluded to defraud the defendant company, because it directs and permits the jury to find that the defendant waived its right to insist as a defense, upon the provisions of the policy of insurance, that the entire policy, unless otherwise provided by agreement endorsed upon the policy or added thereto, should be void if the interest of the insured was other than that of sole and unconditional ownership, solely upon finding as a fact that the agent, Langer, prior to writing the policy had acquired knowledge that the plaintiff Myhre had an equal undivided one-half interest therein; and further, because it directs and permits

the jury to find that the defendant company waived its right to insist as a defense that the loss sustained was outside of, and not a part of, the undertaking and contract of the policy, which undertaking and contract was to insure the described building and household furniture and personal effects located in the insured dwelling house building while used only for dwelling house purposes, solely upon finding as a fact that the agent, Langer, prior to the time of writing the policy, had acquired knowledge that the insured building had theretofore been used, and the insurer intended to use it in the future, as an inn [132] or hotel, and because such instruction directs and permits the jury to find and return a verdict for the plaintiffs upon the assumption of a waiver of the provisions and undertakings of the policy of insurance, which, under the express terms of said policy, can be modified or waived only by an agreement endorsed upon said policy or added thereto.

Eighth: In denying the defendant's motion, made at the close of the direct testimony of the witness John Myhre, and renewed at the close of the plaintiffs' evidence, to strike the evidence of the said witness as to what was said by the witness and by Bilquist and Langer, and as to what was not said by Langer, received subject to the defendant's objection, as being an attempt to vary the terms of the written contract of insurance by parole testimony, and as an attempt to show a waiver of the terms, provisions and conditions of the policy by parole evidence, and contrary to the provisions of

the policy that its terms, stipulations and conditions could be waived only by agreement endorsed upon the policy or added thereto.

Ninth: In denying the defendant's motion, made at the close of the plaintiffs' evidence, and renewed at the close of all the evidence, to strike all the evidence adduced on behalf of the plaintiffs, received as subject to the defendant's objection, tending in any way to waive, alter or modify by parole testimony the terms of the written policy of insurance.

Tenth: In rendering judgment against the defendant for interest upon the amount of the recovery allowed by the verdict of the jury from February 1st, 1937, and covering a period prior to the date of the judgment and prior to the time of the return into court of the verdict of the jury on February 1st, 1938, no separate recovery of interest having been allowed in such verdict, and the recovery of interest not having been claimed in the complaint.

Wherefore, the defendant and appellant prays that the [133] judgment and verdict be reversed and set aside and that a judgment be entered for the defendant, or, in the alternative, that the defendant be granted a new trial herein.

DAVIS and GROFF
Attorneys for the Defendant
and Appellant.

[Endorsed]: Filed Apr. 8, 1938. [134]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It appearing to the court that the Fidelity and Guaranty Fire Corporation of Baltimore, defendant in the above entitled cause, has filed in this court its petition for an appeal from the final judgment against it in this cause, dated the 28th day of February, 1938, with an assignment of errors and prayer for reversal,

It Is Hereby Ordered that an appeal as prayed for in said petition be and is hereby allowed.

It Is Further Ordered that the bond on appeal, conditioned as required by law, is hereby fixed at the sum of Five Thousand and no/100 ($5000.00) dollars, and said bond shall operate as a supersedeas and cost bond and shall stay and suspend all further proceedings in this court until the determination of such appeal.

It Is Further Ordered and Adjudged that this court do, and it hereby does, retain and reserve to itself jurisdiction of this cause for the purpose of making all orders and rulings necessary or proper for the settling and certifying of the Bill of Exceptions therein, and for the purpose of approving, signing and settling the same.

Done in Open Court this 11th day of April, 1938.

JOHN C. BOWEN

Judge

[Endorsed]: Filed Apr. 11, 1938. [135]

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents, that we Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, the above named defendant, as principal, and United States Fidelity and Guaranty Company, a corporation duly organized and existing under the laws of the State of Maryland, having its principal office and place of business in the City of Baltimore and the State of Maryland, and duly empowered by law to act as and bind itself as a surety, and to transact a surety business within the State of Washington, as surety, are held and firmly bound unto William E. Bilquist, John Myhre and Signe Myhre, plaintiffs in the above entitled action, in the full and just sum of Five Thousand Dollars ($5000.00) to be paid to the said William E. Bilquist, John Myhre and Signe Myhre, plaintiffs, their attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and dated this 11th day of April, A. D. 1938.

Whereas, lately, at a regular term of the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, Washington, in said District, in a suit pending in said court between William E. Bilquist, John Myhre and Signe Myhre as plaintiffs, and the said Fidelity and Guaranty Fire Corporation of Baltimore, as

defendant, and being cause numbered 21098 on the law docket of said court, final judgment was rendered against the said Fidelity and Guaranty Fire Corporation of Baltimore for the sum of Four Thousand Dollars ($4000.00) with interest thereon at the rate of 6% per annum, computed from the first day of February, 1937, and the said defendant Fidelity [136] and Guaranty Fire Corporation of Baltimore has been allowed an appeal to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said William E. Bilquist, John Myhre and Signe Myhre, appellees, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California, according to law, within thirty (30) days from the date hereof.

Now the Condition of the Above Obligation is such that if the said Fidelity and Guaranty Fire Corporation of Baltimore shall prosecute its appeal to effect, and will pay the amount of said judgment and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; else to remain in full force and virtue.

FIDELITY AND GUARANTY
FIRE CORPORATION OF
BALTIMORE
By DAVIS and GROFF
Its Attorneys of Record

[Seal] UNITED STATES FIDELITY
AND GUARANTY COMPANY
By JOHN C. McCOLLISTER
Its Attorney in Fact

The foregoing bond is hereby approved this 13th day of April, A. D. 1938.

JOHN C. BOWEN
Judge, United States District Court.

Copy of the within bond received this 11th day of April, 1938.

RAY R. GREENWOOD
H. SYLVESTER GARVIN
Attorneys for the Appellees.

Approved as to form.
H. SYLVESTER GARVIN

[Endorsed]: Filed Apr. 13, 1938. [137]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL

To the clerk of the above entitled court:

Please prepare, certify and file with the clerk of the United States Circuit Court of Appeals for the ninth circuit, a transcript of the record in the above entitled cause, including the following records, papers and documents filed in your office in the said cause.

1. Original complaint.
2. Notice of filing petition and bond for removal.
3. Petition for removal.
4. Bond on removal.

5. Order of removal.
6. Defendant's answer.
7. Plaintiff's reply, and Amended Reply.
8. Impanelling jury.
9. Verdict.
10. Motion for judgment notwithstanding verdict and in alternative for new trial.
11. Order denying motion for judgment notwithstanding the verdict and granting leave to withdraw motion for new trial.
12. Withdrawal of motion for a new trial.
13. Judgment.
14. Bill of exceptions taken on trial.
15. Petition for allowance of appeal. [138]
16. Assignments of error and prayer for reversal.
17. Order allowing appeal.
18. Bond upon appeal and approval.
19. Citation upon appeal.
20. This praecipe.

Dated April 15th, 1938.

DAVIS and GROFF
Attorneys for Defendant and Appellant.

Copy of the foregoing praecipe received this 16th day of April, 1938, and no eliminations, additions or amendments thereto are suggested.

RAY R. GREENWOOD
Attorneys for Plaintiffs and Appellees.

[Endorsed]: Filed Apr. 18, 1938. [139]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 139, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [140]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 378 folios at 15¢	$56.70
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
Total	$62.70

I hereby certify that the above cost for preparing and certifying record, amounting to $62.70, has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 3d day of May, 1938.

[Seal] EDGAR M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By TRUMAN EGGER
Deputy. [141]

[Title of District Court and Cause.]

CITATION UPON APPEAL

The President of the United States of America, to William E. Bilquist, John Myhre and Signe Myhre, Greeting:

You are hereby notified that in a certain case at law in the United States District Court for the Western District of Washington, Northern Division, wherein William E. Bilquist, John Myhre and Signe Myhre were plaintiffs and the Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, was defendant, in which, on the 28th day of February, 1938, a judgment was entered in favor of the said William E. Bilquist, John Myhre and Signe Myhre and against the defendant Fidelity and Guaranty Fire Corporation of Baltimore, an appeal has been allowed the said defendant to the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, you, the said William E. Bilquist, John Myhre and Signe Myhre, are hereby cited and admonished to be and appear in said United States Circuit Court of Appeals at San Francisco, in the State of California, thirty (30) days after the date of this citation, to show cause, if any there be, why error appearing in said judgment should not be corrected, the [142] judgment appealed from be reversed, and judgment entered for the defendant, or, in the alternative, the cause be remanded for a new trial, and speedy justice done the parties in this behalf.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, this 13th day of April, 1938.

[Seal] JOHN C. BOWEN,
Judge, United States District Court for Western District of Washington.

Service of the foregoing citation by delivery to the undersigned of a copy thereof this 13th day of April, A. D. 1938, is hereby acknowledged.

RAY R. GREENWOOD
Attorney for the Plaintiffs and Appellees.

[Endorsed]: Filed April 18, 1938. [143]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, a corporation,
Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,
Appellees.

STIPULATION AS TO PRINTING OF RECORD

The appellant, Fidelity and Guaranty Fire Corporation, hereby, and in accordance with the pro-

visions of paragraph 8 of rule number 23 of the rules of the United States Circuit Court of Appeals for the Ninth Circuit, states that in and upon this appeal it intends to, and will, rely upon all the errors of the trial court set forth in its assignments of error, filed in this cause and numbered first, second, third, fourth, fifth, sixth, eighth, ninth and tenth.

The appellant will not rely upon error of the trial court in its instructions to the jury set forth in the seventh assignment of such assignments of error in this cause, and it hereby waives such seventh assignment of error, and the exceptions upon which such assignment is based, and waives all defenses based upon its fourth and further answer and affirmative defense in its answer contained.

That all of the record incorporated in the transcript is necessary for the consideration of the errors upon which the appellant intends to rely, except the following portions thereof:

A. The fourth and further answer and affirmative defense contained in the defendant's answer, and commencing with the word "and" in line 13 from the top of page 35 of the original certified record and ending with the word "action" in line 13 from the top of page 37 of such certified record.

B. The plaintiffs' reply to such fourth and further answer and affirmative defense contained in the defendant's answer, and commencing with the word "Replying" in line 7 from the top of page 42 of the original certified record and ending with the

word "reply" in line 15 from the top of page 42 of such certified record.

C. The plaintiffs' amended reply to such fourth and further answer and affirmative defense contained in the defendant's answer, and commencing with the word "Replying" in line 7 from the top of page 42 of the original certified record and ending with the word "reply" in line 15 from the top of page 42 of such certified record.

D. The instructions of the court to the jury and the defendant's exceptions thereto, commencing with the word "The" in line 24 from the top of page 46 of the bill of exceptions, and including the remainder of said page 46 and all of pages 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60 of said bill of exceptions, and all of page 61 of said bill of exceptions to and including the word "jury" in line 8 thereof—the same commencing with the word "the" in line 24 from the top of page 105 of the original certified record and including all of the remainder of such page and all of pages 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119 thereof and all of page 120 down to and ending with the word "jury" on line 8 from the top of page 120 of such original certified record.

That the portions of the original certified record so indicated under the letters A, B, C and D are immaterial to any question of error which the appellant will urge upon the appeal, and need not be, and ought not to be, printed.

Dated May 3d, 1938.

DAVIS and GROFF
Attorneys for Fidelity and Guaranty Fire Corporation, Appellant.

Receipt of a copy of the foregoing statement and stipulation as to the printing of the record is acknowledged this 3rd day of May, 1938, and it is hereby stipulated that the parts of the record designated therein under the captions A, B, C and D may be omitted from the printed record.

RAY R. GREENWOOD
Attorney for Appellees.

[Endorsed]: Filed May 5, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION UNDER RULE 23

It Is Stipulated between the parties hereto, through their respective attorneys of record, that there need not be printed in the printed record to be printed for use in the Circuit Court of Appeals the formal caption to the papers included in the certified original transcript, save to set forth the designation or character of the paper to be printed, and that they may be omitted at the end of such paper, printing or order the formal certificate of

filing, other than the date of filing, the file mark and the signature of the clerk.

Dated at Seattle this 3rd day of May, 1938.

DAVIS and GROFF
Attorneys for Appellant
RAY R. GREENWOOD
Attorney for Appellees

[Endorsed]: Filed May 5, 1938. Paul P. O'Brien, Clerk.

[Endorsed]: No. 8835. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, Appellant, vs. William E. Bilquist, John Myhre and Signe Myhre, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed May 5, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.